QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission have the power under 49 U.S.C. § 11341(a) to relieve a railroad of its obligations to employees under 49 U.S.C. § 11347, including a railroad's obligations to continue collective bargaining rights?

2. If the answer to the first question is in the affirmative, may the ICC relieve a carrier participating in an approved consolidation transaction of its obligations to its employees under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, without first supplying specific findings to support its decision that such an exemption is necessary?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-792

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

No. 85-793

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT UNITED TRANSPORTATION UNION

On November 7, 1985, petitioners Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] and Missouri-Kansas-Texas Railroad Company [hereinafter, "MKT"] filed separate timely petitions with this Court for the issuance of writs of certiorari to the United States Court of

Appeals for the District of Columbia Circuit to review a decision by a divided panel of that court in *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), which vacated and remanded orders of the ICC in which the Commission concluded that an earlier ICC order had relieved several railroads of whatever statutory or contractual obligations they may have had to allow employees to participate in the selection of forces to perform certain trackage rights operations. On March 24, 1986, this Court granted the ICC's and MKT's petitions, and this review proceeding has followed.[1]

COUNTERSTATEMENT OF THE CASE

In October 1982, petitioner ICC issued a decision of almost two hundred pages with an additional one hundred and sixty-three pages of appendices approving the Union Pacific Corporation's request to create the Pacific Rail System, a holding company which would control the Missouri Pacific, Union Pacific and Western Pacific railroads. *Union Pacific Corp.—Control*, 366 I.C.C. 459 (1982), *aff'd in part, remanded in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1978), *cert. denied*, 105 S.Ct. 1171 (1985). Two months later, the applicants exercised that authority and formed a single rail system which operates over 22,000 miles of rail "connecting the Pacific Northwest, northern and southern California through the central corridor with the Midwest (including all major mid-continent east-west gateways), Mississippi River ports, Gulf Coast ports, and Texas-Mexico border crossing points." *Id.* at 474. That ICC approval, however, was not unlimited, for the Commission imposed two forms of conditions on its approval—*i.e.*, grant of trackage rights to competitors, and the imposition of employee protective provisions. It is the interaction of those conditions which has led to this proceeding.

[1] Respondents Brotherhood of Locomotive Engineers and United Transportation Union [hereinafter, "BLE" and "UTU," respectively] filed cross-petitions for writs of certiorari to review the underlying issue of whether an ICC order can ever be viewed as superseding Railway Labor Act or employee contractual obligations. Sup. Ct. Nos. 85-983 and 85-997. Those petitions are still pending.

After concluding that the proposed Pacific Rail System would pose anti-competitive problems in at least three geographical areas, the ICC believed that it could redress those anti-competitive concerns by granting a competitor in each geographical area access to the market in which adequate competition was threatened. 366 I.C.C. at 589. To accomplish this, the Commission imposed as a condition of its approval of the main control application the requirement that the primary applicants (*i.e.*, the Missouri Pacific and Union Pacific railroads) give several railroads trackage rights[2] over their lines to enable those competing railroads to serve the threatened markets. As relevant to this case, the Commission required the Missouri Pacific and Union Pacific to give the MKT trackage rights over approximately 200 miles of track from Kansas City, Missouri to Council Bluffs, Iowa.[3] 366 I.C.C. at 570. Another railroad, the Denver & Rio Grande Western Railroad [hereinafter, "D&RGW"] was to be given trackage rights over 619 miles of Missouri Pacific track from Pueblo, Colorado to Kansas City, Missouri. 366 I.C.C. at 572.[4] In both cases, neither the MKT nor the D&RGW had operated directly into

[2] Trackage rights, as the D.C. Circuit explained, "give one railroad the right to run its trains over another railroad's tracks." Appendix to ICC Petition [hereinafter, "ICC App."] at 7a n.2. Petitioner MKT (MKT Br. at 12 n.7) and the railroads participating as *amici* (*Amici* Br. 3 n.3) assert that it is standard industry practice for a trackage rights tenant to use its own power and crews. While respondent UTU agrees that this is true for "bridge" trackage rights—*i.e.*, trackage rights giving the tenant carrier the ability to bypass its own line to move the same traffic which it had previously moved—respondent has challenged this statement of industry practice for trackage rights which, as here, entail an extension of the tenant's operations into the landlord's markets to haul traffic previously moved by the landlord. This factual dispute was raised in *Missouri Pacific R.R. v. UTU*, E.D. Mo. Civil Action No. 83-771-C(1) (*see*, Sup. Ct. No. 85-1054), but was not resolved by the district court.

[3] Those trackage rights extended from Kansas City, Missouri to Omaha, Nebraska and from Union to Lincoln, Nebraska on the Missouri Pacific; Union Pacific tracks were involved from Omaha to Council Bluffs.

[4] A third carrier, the St. Louis Southwestern Railway, was granted trackage rights over the Missouri Pacific between Kansas City and St. Louis. Those rights duplicated the tenant's existing right to operate between those two points, albeit on a line which it acquired from another carrier in 1980. *See*, 366 I.C.C. at 585. The St. Louis Southwestern's implementation of those trackage rights is not at issue in this case.

those markets prior to the ICC's order, but, rather, had participated in the movement of the traffic generated from those markets by interchanging with the Missouri Pacific at Kansas City for the MKT and at Pueblo for the D&RGW. Consequently, as a result of the trackage rights conditions, MKT and D&RGW were to be given the right to haul traffic over Missouri Pacific tracks which, prior to this authorization, was transported by Missouri Pacific train crews over those same rail lines. Those grants of trackage rights authority, according to the Commission, were necessary "in order to preserve the competitive balance in transportation markets where competition might otherwise be significantly lessened as a result of the consolidations." 366 I.C.C. at 589.

Since the Missouri Pacific and Union Pacific had opposed the MKT's and D&RGW's trackage rights requests, the parties had not reached an agreement on the terms upon which the trackage rights would be granted, if required by the Commission, and, thus, the Commission did not have written agreements before it when it issued its 1982 Decision. That fact, however, did not preclude the ICC from granting the MKT's and D&RGW's requests, for as the Commission explained (366 I.C.C at 589):

> No agreements have been reached between the parties regarding the trackage rights for which we have found a need. We prefer that the parties set the terms of their trackage rights agreements wherever possible, and then seek our approval as required, 49 U.S.C. 11343. In the event the parties should be unable to reach agreement, we will set the terms for the trackage rights.

In order to give the railroads time for meaningful negotiations, the ICC stated that it would not entertain petitions requesting the Commission to set the trackage rights terms until at least 60 days after the effective date of the decision—*i.e.*, 60 days after November 19, 1982. 366 I.C.C. at 590. Nevertheless, the lack of specific terms was not to delay the implementation of trackage rights, for the Commission noted that: "[I]mmediately upon consummation of the consolidations, the imposed trackage rights will become effective and trackage

rights tenants will have authority to commence operations." *Id.* This was so even though one of the most "material" terms of a trackage rights arrangement—compensation—had not been set. This fact, however, did not preclude implementation, for the ICC added that: "Compensation, which will accrue from the actual date of the start of trackage rights operations, will be payable after terms have been determined." *Id.*

Compensation was not the only term left unresolved, for the Commission recognized in its decision that petitioner MKT's proposed operations "may require some revision." 366 I.C.C. at 569. For example, the ICC noted that the MKT's plan to use one crew to operate the 200 route miles "appears unrealistic." *Id.* But that was immaterial, for as the ICC explained (*id.*):

> If MKT cannot perform the proposed operations using only one crew, then it should be able to revise its plan to provide for service using two crews, with the crew change occurring at an appropriate point between Kansas City and Omaha. Although operations using two crews would be more costly than using one crew, such operations appear feasible and would prevent operating problems relating to hours of service laws [*i.e.*, federal law which limits train crews to twelve hours of continuous service with prescribed rest periods thereafter, 45 U.S.C. § 62].

Trackage rights were not the only form of conditions imposed by the ICC on its approval of the control application, for the Commission, in compliance with 49 U.S.C. § 11347, required the primary applicants and the trackage rights tenants to provide fair arrangements to protect the interests of employees who may be affected by the various transactions approved by the ICC.[5] First, the Commission provided that its control and coordination authority granted to Missouri Pacific, Union

[5] Certain rail labor organizations, including petitioner UTU, challenged whether the ICC had complied with 49 U.S.C. § 11347 in issuing its 1982 Decision because the ICC refused in that order to protect employees of nonapplicant carriers who might be affected by the control approval. 366 I.C.C. at 621. That challenge was rejected by the Court of Appeals for the

(footnote continues)

Pacific and Western Pacific was "subject to the conditions for the protection of employees enunciated in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979)," *aff'd, New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). 366 I.C.C. at 654, ¶ 17. And second, the ICC stated in its order that: "The trackage rights authority granted [to MKT and D&RGW, among others] . . . are subject to the imposition of the employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 654 (1980) [*aff'd, Railway Labor Executives' Assoc. v. United States*, 675 F.2d 1248 (D.C. Cir. 1982)]." 366 I.C.C. at 654, ¶ 19.

Both sets of employee protective conditions (*i.e.*, the *New York Dock* and *Norfolk and Western* conditions) [6] require that the rail carriers upon whom those obligations were imposed preserve all "rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise . . . ." *E.g., Norfolk & Western* conditions, Art. 1, § 2, 354 I.C.C. at 610; [7] *see also,*

(footnote continued)

District of Columbia Circuit in *Southern Pac. Transp. Co. v. ICC, supra*, 736 F.2d at 725. This Court denied the petition by those labor organizations, including the UTU, for a writ of certiorari to review the court of appeals' decision. *BMWE v. United States*, Sup. Ct. No. 84-641.

[6] According to the Commission, the *New York Dock* conditions are the minimum levels of employee protection required by 49 U.S.C. § 11347 to be imposed in control, merger or purchase cases, whereas the *Norfolk & Western* conditions are the minimum levels to be imposed in trackage rights cases. *See*, 366 I.C.C. at 620, 622. While the monetary benefits provided by both sets of conditions are identical, their principal difference lies in their provisions requiring advance notice and negotiation before the carriers may implement a "transaction" which may adversely affect employees. *See*, note 8, *infra* at p. 7.

[7] Art. 1, § 2, of the *Norfolk & Western* conditions provides (354 I.C.C. at 610):

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including

(footnote continues)

New York Dock conditions, Art. 1, § 2, 360 I.C.C. at 84. Moreover, both sets of conditions provide that any carrier upon whom the conditions are imposed which contemplates consummating a "transaction" (*e.g.*, trackage rights under the *Norfolk & Western* conditions), must give advance notice of such a transaction to all "interested employees" and to their employee representatives, and must, if required, negotiate an implementing agreement to provide for, among other matters, "the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case . . . ." *Norfolk & Western* conditions, Art. 1, § 4, 354 I.C.C. at 610; *New York Dock* conditions, Art. 1, § 4, 360 I.C.C. at 85. Both sets of conditions are virtually identical on this point and provide as follows:

> Each transaction which will result in a dismissal or displacement of employees or or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

Norfolk & Western conditions, Art. 1, § 4, 354 I.C.C. at 610-11; *New York Dock* conditions, Art. 1, § 4, 360 I.C.C. at 85.[8]

(footnote continued)

> continuation of pension rights and benefits) of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

[8] A difference between the two sets of conditions is that the *Norfolk & Western* conditions uses the word "will" in the first line quoted above, whereas the *New York Dock* conditions uses the term "may." The main substantive differences between the notice and negotiation provisions in the two sets of conditions, however, concerns the length of the advance notice (*i.e.*, 90 versus 20 days) and the fact that the *New York Dock* conditions prohibits the consummation of a transaction until an implementing agreement is reached whereas the *Norfolk & Western* conditions does not prohibit the consummation of the transaction at the end of the 20 days notice period even though the parties are still negotiating an implementing agremeent. *See, Railway Labor Executives' Assoc. v. United States, supra*, 675 F.2d at 1253.

The dispute which has finally reached this Court has resulted from rail labor's attempts to enforce the requirements in both sets of conditions that the railroads preserve collective bargaining rights (*i.e.*, Art. 1, § 2) and that they give rail labor a voice in the crew selection process (*i.e.*, Art. 1, § 4). Petitioner MKT and the other involved railroads, along with the ICC, on the other hand, assert that those protective provisions must be viewed in light of the specific "transaction" approved by the Commission and, to the extent "that existing working conditions and collective bargaining agreements conflict with a transaction which [the ICC has] . . . approved, those conditions and agreements must give way to the implementation of the transaction." ICC Decision of October 25, 1983 at 6; ICC App. at 60a. This conflict arises in this case because both the MKT and the D&RGW submitted proposed operating plans in support of their trackage rights requests and included in those plans assumptions as to the manner in which they would staff the trackage rights operations; petitioners assert that those assumptions now control over conflicting provisions in either the employee protective conditions or the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

In its application for trackage rights, petitioner MKT proposed using its own employees to perform its trackage rights operations over the Missouri Pacific and Union Pacific tracks and submitted a proposed agreement which provided that MKT "with its own employees, and its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." ICC Decision of October 25, 1983 at 8; ICC App. at 62a. D&RGW, however, was not so emphatic and stated in its application that it "'may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars'" over Missouri Pacific tracks. *Id.* at 9 quoting D&RGW application; ICC App. at 62a. During the hearings on their proposed trackage rights, counsel for the Union Pacific and Missouri Pacific questioned a D&RGW witness on that carrier's crew proposal; that witness explained that "'as these trackage rights are granted to us we are willing to sit down and work out any kind of arrangement you [UP-MP] want . . . .'" ICC Decision of October 25, 1983, at 10, quoting Transcript of June 23, 1981 hearing; ICC App. at 63a.

Contrary to petitioners' allegations (ICC Br. at 7-9; MKT Br. at 4) rail labor, including respondent UTU, did not sit idly by while the ICC was considering the contingent trackage rights applications. Respondent UTU was one of five (5) unions which participated as a protestant to the MKT and D & RGW trackage rights requests. *See,* 366 I.C.C. at 482; Joint Appendix to Court of Appeals [hereinafter, "J.A."] at ii (No. 15) and ix (No. 10). In their comments in opposition to the trackage rights applications of MKT and D&RGW, respondent UTU and the four (4) other labor organizations stated that the proposed trackage rights would "clearly have an effect upon employees." *E.g.*, Comments of Brotherhood of Maintenance of Way Employes, *et al.*, Finance Docket No. 30,000 (Sub-Nos. 20-33) at 2 (Certified Index No. 10 at J.A. ix). Respondent UTU and the other labor organizations stated further that:

> Consequently, the above labor organizations submit, this Commission must consider the interests of employees in passing upon the merits of this transaction, and must, if it approves this application, condition that approval by imposing a fair and equitable arrangement to protect the interests of employees who may be affected thereby.

Id. at 2-3. An identical position was taken by the UTU concerning the D&RGW's application (Comments of Brotherhood of Maintenance of Way Employes, *et al.*, Finance Docket No. 30,000 (Sub-No. 18) at 2-3 (Certified Index No. 15 at J.A. ii)), and in both cases respondent UTU requested the imposition of employee protective conditions which required, among other things, the preservation of collective bargaining rights, advance notice of the transaction, and the negotiation of an implementing agreement to provide for "the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case . . . ." *Id.* at Exhibit A, page 4. The substance of those requests were granted. 366 I.C.C at 654, ¶ 19.

When it approved the control application and imposed the MKT and D&RGW trackage rights as a condition of that

approval, the ICC did not expressly address, or suggest by implication, that the trackage rights applicants' crewing proposals were "material" terms of the trackage rights authority. On the other hand, the ICC's order provided that the grant of trackage rights authority to MKT and D&RGW was approved, but only "to the extent and under terms and conditions discussed in the decision" (366 I.C.C. at 654, ¶ 14), one such condition being that the trackage rights tenants' must agree to abide by the *Norfolk & Western* conditions. As the court of appeals remarked, therein "lies the nub of this case," for from all appearances, the ICC's imposition of employee protection qualified its approval of the crew selection proposals, rather than the reverse. ICC App. at 13a n.3.

A. MKT's and D&RGW's Trackage Rights Operations

Shortly after the control authority was consummated on December 22, 1982, the Missouri Pacific sent a letter on December 31, 1982, to various representatives of its employees, including respondent UTU, informing rail labor that the MKT and D&RGW would commence trackage rights operations over the Missouri Pacific in the near future; according to that letter, the MKT would commence its operations on or about January 3, 1983. *Missouri Pacific R.R. v. UTU*, E.D. Mo. Civil Action No. 83 771(c)(1), Memorandum Decision, reproduced as Addendum A to ICC Petition [hereinafter, "ICC Pet."] at 6a. Respondent UTU asked the Missouri Pacific to negotiate with it over the impact of those trackage rights operations on Missouri Pacific employees and over the transfer to MKT of the right to operate on Missouri Pacific tracks. ICC Pet. at 9a. Missouri Pacific refused to negotiate on either subject because, in its opinion, the ICC's October 1982 decision required it to grant trackage rights to MKT and it, therefore, had no right to negotiate about either the selection of forces to staff MKT's operations over its tracks, or other aspects of the impact of that transfer of operating rights on Missouri Pacific employees represented by the UTU. J.A. at 125-26. As the Missouri Pacific subsequently explained, "it would be inappropriate and unproductive" for it to bargain with the UTU because it had no

ability "to bind" MKT or D&RGW "to an agreement regarding selection of forces." *Id.*[9]

Petitioner MKT commenced operations over the Missouri Pacific's and Union Pacific's lines on January 6, 1983, using its own employees. Respondent D&RGW also commenced operations over the Missouri Pacific lines but, unlike MKT, used and is still using Missouri Pacific employees to perform those operations. J.A. at 74-75.

After unsuccessfully requesting the Missouri Pacific to bargain with it over the trackage rights operations by MKT, respondent UTU informed the Missouri Pacific that the employees which it represented on that carrier would withdraw their service at 12:01 a.m. on April 4, 1983. J.A. at 74. Respondent Missouri Pacific sought and obtained on March 30, 1983, a Temporary Restraining Order enjoining any strike by petitioner over this dispute. J.A. at 75. That interlocutory injunction was made permanent in 1984, and was subsequently affirmed by the United States Court of Appeals for the Eighth Circuit. *Missouri Pacific R.R. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 85-1054.

B. Proceedings Before The ICC

Respondent BLE reacted differently to the carriers' refusal to negotiate over the crew selection issue and on April 4, 1983, it asked the ICC to clarify the prior order approving the control application. Respondent BLE asserted in its petition for clarification that the October 1982 decision did not mandate the use of MKT or D&RGW crews, but, rather, left the crew selection issue to be resolved under the procedures of the

[9] On June 16, 1983, respondent UTU asked all carriers involved in this case to negotiate implementing agreements under Article 1, Section 4 of the employee protective provisions to provide for a mutually agreeable basis upon which all affected employees, including Missouri Pacific employees, would be allowed to participate in the work opportunities presented by the trackage rights operations. J.A. at 122. The Missouri Pacific responded as quoted above, while petitioner MKT responded by asserting that it had negotiated agreements with its own employees, including an agreement with the UTU for MKT employees represented by the UTU, and, thus, it had no obligation under the ICC conditions to negotiate with the UTU over affected Missouri Pacific employees. J.A. at 129-31. D&RGW never responded to the UTU's request. J.A. at 117.

Railway Labor Act, 45 U.S.C. § 151, *et seq.* J.A. at 4. On May 18, 1983, the ICC issued a decision denying the BLE's petition. ICC App. at 51a. According to the Commission, there was no need to clarify its prior order because: "We have broad authority to impose conditions on consolidations and our jurisdiction is plenary." *Id.* at 54a. As the ICC explained: "Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations." *Id.*

Respondent BLE, joined by the UTU which filed a separate petition, asked the ICC to reconsider its denial of the petition to clarify, asserting that the ICC did not have the authority to abrogate Railway Labor Act rights and that, even if it did, it had not done so in this case. *E.g.*, J.A. at 71. Those separate requests for reconsideration generated a fifteen (15) page decision by the ICC, served on October 25, 1983, in which the Commission asserted that 49 U.S.C. § 11347 did not limit its powers to abrogate Railway Labor Act obligations (ICC App. at 59a-60a) and that, since its immunity powers under 49 U.S.C. § 11341(a) were "self-executing," its decision automatically operated to relieve the carriers of "any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision." *Id.* at 67a-68a.

Respondent UTU had asserted in its petition for reconsideration that Section 11341(a) could not be read as relieving a carrier of its obligations to employees under the Railway Labor Act or collective bargaining agreements because 49 U.S.C. § 11347 required the Commission to impose employee protective conditions which provided that the railroads must preserve those statutory and contractual rights. J.A. at 78-80. That argument was rejected by the Commission because, in the ICC's opinion, the UTU had misjudged the interrelationship between Sections 11341(a) and 11347; according to the Commission (ICC Decision of October 25, 1983, at 6; ICC App. at 59a-60a, emphasis added):

> . . . [S]tandard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. *To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction.* The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

Respondents BLE and UTU filed separate petitions with the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, to review the ICC's decision of October 25, 1983; respondent BLE also asked the court of appeals to review the May 18, 1983 denial of the petition for clarification.

C. Court of Appeals' Decision

On May 3, 1985, a panel of the court of appeals, with one judge dissenting, issued a decision vacating the ICC's decisions. After rejecting an assertion that the unions' petitions to review were untimely because they had not been filed within 60 days of the October 1982 order, the divided panel addressed the unions' challenges to the merits of the ICC's denial of the petition for clarification and concluded that the ICC's 1983 orders should be set aside because the ICC "made no semblance of a showing that the exemption [concerning the crew selection issues] was necessary, as required by the exemption authority section [*i.e.*, 49 U.S.C. § 11341(a)] . . . ." ICC App. at 3a. As the majority stated:

> Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.
>
> This statutory limit on the Commission's authority creates certain responsibilities for ICC. In ex-

> ercising its waiver authority ICC must do more than shake a wand to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.

Id. at 16a (footnote omitted).

Applying that principle to the case before it, the court observed that "the Commission did not give a shred of reasoning to support its view that completion of the [trackage rights] transactions required shielding crew selection from the Railway Labor Act." ICC App. at 19a (footnote omitted). Consequently, the majority concluded, the ICC "exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection." *Id.* at 20a. The court then vacated in their entirety the ICC's decisions on the petition for clarification and the petitions for reconsideration. *Id.* at 21a.

On July 12, 1985, after the ICC had asked the court to reconsider its decision (including that portion of the decision vacating but not remanding), the court *sua sponte* amended its decision to provide that the case was to be remanded to the Commission for proceedings consistent with its opinion. Appendix to ICC Petition at 45a. The court also added in its *sua sponte* order that *(Id.)*:

> The Commission is not empowered [on remand] to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the procompetitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

Respondent UTU's assertion that the ICC's immunity provisions could not be read as relieving a carrier of its Railway Labor Act or contractual obligations to its employees because of 49 U.S.C. 11347, was not ruled upon. In the court of

appeals' view, its disposition of the case made a ruling on this issue unnecessary.[10] As the court stated (ICC App. at 20a-21a; footnote omitted):

> In view of this disposition, it is unnecessary to reach the second statutory issue whether ICC may ever waive the labor protection condition section (§ 11347) through the exercise of the exemption authority (§ 11341(a)). That issue turns on whether Section 11347 is viewed as a "law" that may be appropriately waived, or as a specific qualification on the exemption authority itself. We note only that the Commission has completely failed to show any conflict between these two sections of the Interstate Commerce Act, which we assume were meant to be read in concert rather than in conflict, and we need not comment on the unlikely event that the two sections may pose a genuine conflict in some later case.

This review proceeding on writs of certiorari has followed.

SUMMARY OF ARGUMENTS

I. Section 11341(a) of the Interstate Commerce Act provides that a carrier participating in a consolidation transaction approved by the ICC is relieved of restraints imposed by all laws, including federal law, "insofar as may be necessary to enable [that carrier] . . . to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . . ." 49 U.S.C. § 5(12)(1976), since recodified as 49 U.S.C. § 11341(a). That exemption, as its clear terms indicate, is limited, for it immunizes a carrier from only those laws as necessary to enable the

[10] Initially, the court vacated the ICC decisions in their entirety without a remand, and, thus, it was clearly unnecessary to reach the issue of the relationship of Sections 11341(a) and 11347. That siutation changed, however, once the court amended its decision to remand this case to the ICC for a hearing. Because it is aggrieved by a remand, respondent UTU asked this Court to issue a writ of certiorari to review that undecided issue (Sup. Ct. No. 85-983); that cross-petition is still pending.

carrier to effectuate an approved transaction. Section 11341(a)'s necessity limitation is an essential part of the statute and, if that provision is to operate effectively as a check on what would otherwise be an unlimited power, some tribunal must determine whether it is necessary to relieve a carrier of a conflicting federal law in order to enable a carrier to effectuate a consolidation transaction approved by the Commission.

In view of both the structure of the Interstate Commerce Act, including its grant of exclusive jurisdiction to the ICC in Section 11341(a) to approve consolidation transactions, and the fact that this grant of immunity depends upon the shape of the transaction as actually approved by the Commission, the Commission should be the tribunal which determines whether the exemption is necessary when it determines what is in fact being approved. This is consistent with the ICC's approach, for the Commission has in the past considered whether Section 11341(a) should operate to relieve a carrier of obligations under other laws. Since the Commission must make specific findings and supply an articulated basis for its conclusions, it must explain why it is necessary to relieve a carrier of its obligations under other federal laws, including the Railway Labor Act, in order to enable that carrier to effectuate the financial transaction authorized by its order.

Here, as the court of appeals concluded, the Commission did not make any findings, either in 1982 when it authorized the trackage rights at issue or in 1983 when it refused to clarify its order, to explain why it was necessary for the trackage rights tenants to use their own crews to perform their operations. Since the Commission has not supplied a reasoned basis to conclude that Missouri Pacific employees must be precluded from participating in the crew selection process, its decisions on this point cannot stand.

II. Section 11341(a)'s immunity provision is further limited to the jurisdiction which Congress has given the Commission over consolidations. The ICC may not authorize a carrier to do an act over which the Commission has no jurisdiction, and, thus, Section 11341(a) cannot be viewed as immunizing that act. Although Congress has required the Commission to consider and to protect the interests of employees when it determines whether a consolidation transaction is

consistent with the public interest, Congress has not given the ICC the authority to regulate rail labor relations arising from consolidations. Congress established a regulatory scheme for rail labor relations in the Railway Labor Act which is separate and distinct from the Interstate Commerce Act and the Commission's jurisdiction. This separate nature of the two regulatory schemes is clear from the Interstate Commerce Act itself, for only rail carriers can invoke the ICC's jurisdiction over consolidations, and if the ICC concludes that a carrier-initiated consolidation is consistent with the public interest, its approval order is purely permissive. Only the carriers may decide whether to accept or to reject that grant of authority; rail labor has no voice in whether the carrier should accept or reject the consolidation authority. It is contrary to elementary principles of statutory construction to assert that this form of statutory scheme also gives an administrative agency power to control and direct the conduct of a third party who has no voice in whether to accept or to reject the ICC's permissive order.

The most telling evidence that Section 11341(a) was never intended to extend to rail labor relations, including the Railway Labor Act, is the fact that for over sixty years during which two forms of regulation have existed side by side, the ICC had never concluded, until this case, that it should regulate a carrier's labor relations. In fact, its consistent position prior to this case was that the two forms of regulation were separate and distinct.

Any question as to whether the ICC had jurisdiction over rail labor relations matters was laid to rest in 1976 when Congress amended the Interstate Commerce Act to enhance the levels of protection which the ICC was required to impose each time the Commission approved a consolidation transaction. Since 1976, the ICC must include in the protective arrangement which it imposes, provisions that require carriers participating in an approved transaction to preserve collective bargaining rights of employees and to give all interested employees a voice in the crew selection process. Consequently, in the case at bar, the ICC's order cannot be viewed as relieving a carrier of its Railway Labor Act obligations, nor can that order be viewed as authorizing the carrier to deprive employees of a voice in the crew selection process.

ARGUMENT

1. Contrary To Petitioners' Assertions, Section 11341(a) Of The Interstate Commerce Act Does Not Operate In A Vacuum, But, Rather, Requires As A Predicate To Its Application An ICC Decision Which Supplies A Reasoned Basis To Conclude That A Carrier Has Been Relieved Of Its Obligations Under Another Federal Law

Petitioners ICC and MKT, joined by the United States and by our nation's railroads, argue that the court of appeals erred in reading Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), as requiring the Commission to supply a reasoned basis for purporting to relieve a carrier participating in a transaction approved under the Act's consolidation provisions, of its obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* According to petitioners and to their supporters, Section 11341(a) is self-executing and automatically operates to relieve a carrier of any obligation imposed by a federal or state law which might impede the effectuation of an approved transaction in the manner proposed to the Commission. That exemption, petitioners assert, applies even if the ICC never addressed the specific means chosen by the carrier to implement its authorization. Respondent UTU respectfully submits that petitioners' view of Section 11341(a) is without merit, for their reading of that immunity provision impermissibly expands the range of carrier actions within its scope, and effectively reads the "necessity" component out of that statute.

A. Section 11341(a) Is Limited And Requires A Necessity Determination

It is axiomatic that the "starting point" in any case involving the interpretation of a federal statute is the "language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Where that language is clear, the inquiry into its meaning should cease, for Congress is presumed to have intended what the plain language of its statutes states. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, since Section 11341(a) is in effect an implied repeal statute, it must not be expanded beyond its literal terms—*i.e.*, it must be construed narrowly. *E.g., Square*

D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. ____, ____ 90 L.Ed.2d 413, 425 (1986); *accord, Watt v. Alaska*, 451 U.S. 259, 267 (1981). When those principles are applied to Section 11341(a), it becomes clear that this immunity provision is not as expansive as petitioners believe. Moreover, respondent UTU respectfully submits, the Interstate Commerce Act itself, prior decisions by this Court and past ICC practice all dictate that the ICC initially establish the scope of that immunity provision; this requires, as the court of appeals concluded, an ICC decision which supplies a reasoned basis for the application of Section 11341(a)'s immunity.

Section 11341(a) provides in pertinent part that: "A carrier . . . participating in [an] . . . approved . . . transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction . . . and operate property . . . acquired through the transaction." 49 U.S.C. § 11341(a). That language provides today, as it essentially prescribed when first enacted in 1920,[11] that a railroad consummating a "transaction" approved by the ICC under the consolidation provisions of the Act (*i.e.*, 49 U.S.C. §§ 11342-11351) is relieved from the operation of all "restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable [that railroad] . . . to do anything authorized . . . by any order" of the ICC under the consolidation provisions. Section 407 of the Transportation Act of 1920, *supra* note 11, 41 Stat. at 482; *compare,* 49 U.S.C. § 11341(a), *with*, § 7 of Transportation Act of 1940, *supra* note

[11] Section 11341(a) was first enacted as Section 5(8) of the Interstate Commerce Act by Section 407 of the Transportation Act of 1920, 41 Stat. 456, 482. It was subsequently reenacted with modifications by Section 202 of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 219, as Section 5(15) of the Interstate Commerce Act. Its last substantive change, except for an amendment in 1982 which is not relevant here (*see*, § 21(a) of the Bus Regulatory Reform Act of 1982, 96 Stat. 1102, 1122)), occurred in 1940 when it was reenacted as Section 5(11) of the Interstate Commerce Act by Section 7 of the Transportation Act of 1940, 54 Stat. 898, 908-09. Section 11341(a)'s current version is the result of the codification of the Interstate Commerce Act which was effected by Pub. L. No. 95-473, 92 Stat. 1337 (1978). That recodification, as stated in Section 3(a) of that Act, was intended to be without substantive change. 92 Stat. at 1466.

11, 54 Stat. at 908-09. Even if Section 11341(a) is viewed as being self-executing as petitioners assert, it is clear that Congress has limited Section 11341(a)'s application to only those laws which, if enforced, would prohibit a carrier from implementing the order of the ICC.

Since Section 11341(a) is limited, the logical question presented by that conclusion is whether any tribunal, and if so, which one, is to determine whether the exemption is necessary in a particular case. Petitioners, however, assert that no agency or court need make a necessity determination, either at the time that a transaction is approved or after, because, in petitioners' view, Section 11341(a)'s immunity is self-executing and automatically flows from the ICC's approval of a transaction as being in the public's interest. Prior approval necessity determinations, petitioners assert, are not contemplated by the Act because the Act requires simply that the transaction be consistent with the public interest. 49 U.S.C. § 11344(c). Post-approval proceedings, petitioners assert, are also contrary to the Act, for they assert that post-approval "necessity" proceedings would frustrate the "basic purpose" of the Act's consolidation provisions, which, according to petitioners, is to encourage carrier-initiated, voluntary consolidation plans. ICC Br. at 34-35. In other words, the carriers propose the manner in which they will effectuate a consolidation transaction, and if the Commission finds that transaction to be consistent with the public interest, the carriers will be relieved of all conflicting legal obligations and may implement their proposal, even if the transaction could be accomplished in another way which would be just as acceptable to the ICC and would not ignore those legal obligations. Respondent UTU disagrees with petitioners' argument, for such an expansive view of Section 11341(a) effectively writes the necessity component out of the law. *See, Texas & New Orleans R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151, 159-60 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). This was obviously not Congress' intent, for no statute should be read in such a way that limiting language is rendered superfluous. *National Insulation Transportation Committee v. ICC*, 683 F.2d 533, 537 (D.C. Cir. 1982).

Since the necessity component of Section 11341(a) is an essential part of the scope of that section, it must be considered by either the ICC or by a court which is subsequently called upon to enforce the obligation from which the railroads contend they have been made immune. Respondent UTU respectfully submits that the structure of the Interstate Commerce Act requires that it be the ICC which passes on this issue.

As the court of appeals noted in its decision, disputes over the application of Section 11341(a) have not frequently arisen, partly because the necessity for the waiver is usually clear. ICC App. at 16a. That is so, respondent UTU submits, because the need for a waiver depends upon the order of the Commission, and where the order of the agency clearly specifies what is to be performed, the application of Section 11341(a) should be obvious. *E.g., Texas v. United States*, 292 U.S. 522 (1934). However, where the order of the agency does not specify that an approved transaction is to be accomplished in a particular way which creates a conflict with other obligations, the justification for the waiver is not present. *Accord, Central New England Ry. v. Boston & Albany R.R.*, 279 U.S. 415, 420 (1929) ("without such a conflict [between legal obligations and an order of ICC which expressly mentions such an obligation], there could be no justification for holding that the order would also operate sub silentio to release a carrier from" its legal obligation). Indeed, this is apparent from the primary case relied upon by petitioners, *BLE v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), for in that case the court quoted with approval and relied upon the ICC's statement in *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 696, 702 (1958), that although the Commission need not determine and declare that a carrier is relieved from particular laws, the agency must "'make clear what the carrier is authorized to do.'" 314 F.2d at 432.

Here, as the court of appeals observed, the ICC's order in 1982 approving the MKT and D&RGW trackage rights requests did not make clear the fact that the agency was also approving their crewing proposals. ICC App. at 13a n.3. In fact, rail labor reasonably believed that the carriers' trackage rights proposals, including the crewing provisions, were quali-

fied by the employee protective provisions which the ICC prescribed in its order, for those protective conditions were imposed as a condition of the ICC's grant of trackage rights. 366 I.C.C at 654, § 19. That limitation of the ICC's approval is not lessened by the Commission's approval of the trackage rights' proposals themselves; the MKT's and D&RGW's trackage rights request were approved only "to the extent and under the terms and conditions" stated in the decision and order. 366 I.C.C. at 654, § 14. Since those employee protective conditions required petitioner MKT and the D&RGW, along with the Missouri Pacific, to preserve collective bargaining rights and to give all interested employees a voice in the crew selection process,[12] it is simply incorrect to say that the ICC's order authorized MKT and D&RGW to deprive Missouri Pacific employees of whatever Railway Labor Act or statutory right they may have had to participate in the crew selection process. Consequently, at the very least the ICC did not make clear what the carrier was authorized to do.

Petitioners nevertheless assert that the need for the waiver is apparent because the MKT and D&RGW specified their crewing proposals in their trackage rights application. The short answer to this assertion, however, is that the carriers' applications are not the order of the Commission. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 445 (1951); *Southern Ry.—Control—Central of Ga. Ry., supra*, 331 I.C.C. at 165. Since the Commission granted those applications subject to the provisions of the employee protective conditions, inconsistent provisions in the application simply cannot be viewed as superseding the agency's order.

[12] Petitioners assume that the MKT's crewing proposal did not violate Article 1, Section 4 of the employee protective conditions which requires that the selection of forces shall be made on a basis provided by an agreement encompassing "all employees involved," because, in their opinion, Art. 1, § 4 does not give affected employees of one railroad the right to insist that another railroad involved in the transaction bargain with them. *See*, ICC Pet. at 8 n.4; MKT Br. at 7-8, 11 n.6. That assumption is false because, as the district court found in *Missouri Pac. R.R. v. UTU, supra*, ICC Pet. at 35 n.12, the plain terms of Art. 1, § 4 clearly provide for negotiations among all interested employees and railroads to devise a method to select forces fairly and equitably. That plain meaning is their intended meaning, for those provisions were devised from Sections 4 and 5 of the Washington Job Protection Agreement of 1936 (*see, New York Dock Ry. v. United States, supra*, 609 F.2d at 95) which the ICC concluded long ago required *all railroads* participating in a transaction to give advance notice to *all involved employees* and to negotiate an implementing agreement which apportions the adverse effect "among the employees of both railroads on the basis of an equitable and acceptable agreement." *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151, 166, 173 (1967).

Section 11341(a) grants carriers an immunity from inconsistent laws because Congress has intended that the ICC's authority over carrier consolidation proposals should be exclusive. 49 U.S.C. § 11341(a); *Texas v. United States, supra*, 292 U.S. at 531. While petitioner UTU submits that this exclusive authority does not extend to matters outside the Commission's jurisdiction (for example, Section 11341, *et seq.*, does not give the ICC authority over a carrier's labor relations), the scope of an ICC order is clearly a matter within the ICC's primary, if not exclusive, jurisdiction. *See generally, Engelhardt v. Consolidated Rail Corporation, et al.*, 756 F.2d 1368, 1369 (2d Cir. 1985); *Zapp v. UTU*, 727 F.2d 617, 625 (7th Cir. 1984). Moreover, if rail labor or any party sought to enforce rights which they contend were not immunized by Section 11341(a), the railroads would obviously assert that such a suit was a collateral attack on an ICC order; in view of 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, the railroads' defense might succeed. *See, Railway Labor Executives' Assoc. v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986). Consequently, it logically follows that the current structure of the Interstate Commerce Act requires that the ICC be the tribunal to determine whether its order authorizes a carrier to perform an act which conflicts with other statutory obligations.

B. In Determining Whether A Carrier Is To Be Relieved Of Inconsistent Federal Laws, The ICC Must Supply A Reasoned Basis For Its Decision

Once it is accepted that the ICC has the responsibility to determine exactly what it is that the carriers in this case have been authorized to do, it follows, respondent UTU submits, that the agency must then supply a reasoned basis for its conclusion. Petitioner ICC is not a legislature, and, therefore, it must include in any decision that it renders under the consoli-

dation provisions of the Interstate Commerce Act "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. § 557(c)(A). If these findings or conclusions are not entered, a reviewing court must set aside the challenged agency action, for, as this Court has observed:

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ."

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962), *quoting, SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Petitioners do not challenge this principle, but they assert that there is no need for findings in this case because Section 11341(a) is self-executing and automatically flows from the agency's specification of exactly what a carrier is authorized to consummate. That argument, however, ignores the fact that, in specifying what a carrier is authorized to do, the Commission must make detailed findings and conclusions. Moreover, when an act authorized by the ICC as being within the public's interest conflicts with another federal law, the Commission must show that it considered the policies expressed in those laws in determining whether the relevant transaction is within the public's interest. *United States v. ICC*, 396 U.S. 491, 511-12 (1970); *Southern Pacific Transportation Co. v. ICC, supra*, 736 F.2d at 721 n.10. That determination, respondent UTU submits, requires the Commission to articulate its reasons and to show that it has considered the policies of the conflicting laws. *United States v. ICC, supra*, 396 U.S. at 514.

Relying upon *Schwabacher v. United States*, 334 U.S. 182 (1948), petitioners argue that the court of appeals erred in requiring the Commission to explain why it was necessary for the MKT and D&RGW to be relieved of whatever obligations

the Railway Labor Act might impose in connection with their crew proposals.[13] Petitioners assert that the agency must find only that the proposed transaction is within the public's interest, and its inquiry must end at that point, for "it is not open to the Commission to make judgments about which terms [devised by the applicants] were sufficiently 'necessary' to override other laws." ICC Br. at 30. Respondent UTU disagrees, for once again petitioners' construction of Section 11341(a) ignores the necessity component.

Schwabacher and cases dealing with Section 11341(a)'s antitrust immunity [14] do not support petitioners' argument, for each of those cases involved conflicts between matters committed to the complete control of the Commission and the applicable state or federal law. For example, in *Schwabacher* this Court observed that the state law at issue in that case dealt with an integral part of the capital structure of the railroad whereas the Interstate Commerce Act gave the ICC "complete control of the capital structure to result from a merger." 334 U.S. at 195. The concept of preemption which is so obviously reflected in Section 11341(a) requires that the federal law prevail over the State law. *Texas v. United States, supra*, 292 U.S. at 534-35. Moreover, Congressional intent to have the Interstate Commerce Act control is obviously true whenever a proposed merger conflicts with antitrust laws. In each of those cases, therefore, Congress had specified that the sole test to be applied in determining whether the matters in question should be approved was the public interest test, and, thus, there was no justification in those cases for adding a further test—*i.e.*, whether the exemption was necessary.

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[13] Echoing the dissent, petitioners assert that it was inexplicable for the court of appeals to have indulged the unions' belief that they had an established right to participate in the MKT's and D&RGW's crewing decisions. *E.g.*, ICC Br. at 23 n.16. What petitioners fail to recognize in making that assertion is that the ICC does not have jurisdiction to decide whether rail labor is correct in contending that there is a right under the Railway Labor Act to require the Missouri Pacific to negotiate on the issues at stake (*see, Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 363 U.S. 330 (1960)); rather, in determining whether § 11341(a) should apply to that asserted right, the ICC must assume that rail labor had such a right. *Schwabacher v. United States, supra*, 334 U.S. at 190.

[14] *E.g., United States v. ICC, supra.*

As explained in Argument II, *infra,* however, the case at bar does not involve a matter committed to the control of the ICC, but, rather, involves a matter which is at best related to the means which a carrier may choose to effectuate the transaction at issue—*i.e.*, the trackage rights. In such cases respondent UTU respectfully submits, the fact that Section 11341(a) must be construed narrowly because it is an implied repeal law, requires the Commission to examine the means proposed by the carrier to ascertain whether that is the only method by which the transaction can be accomplished. *E.g., City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978). Any other approach to a carrier proposal which involves an infringement upon rights granted by statute to third parties would give the railroad the ability to unilaterally decide which statutory obligation will become immunized by Section 11341(a); such an approach will allow the carrier to bind a nonconsenting third party even though another arrangement suitable to the third party would also have been acceptable to the Commission. Respondent UTU respectfully submits that Section 11341(a) was never intended to give the railroads such unbridled power over matters which involve parties who are not applicants. *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra,* 307 F.2d at 159-60.

This limited aspect of Section 11341(a)'s reach to matters which do not pose an obstacle to the effectuation of the acutal financial transaction, as contrasted with the means chosen by the carriers to implement that transaction, may be seen by examining the *City of Palestine* case. In that case, the Fifth Circuit was asked to review a decision of the Commission which had authorized under what is now Section 11341(a) the abrogation of an agreement which a subsidiary of the Missouri Pacific had entered into years before to keep certain employees, offices and shops in Palestine, Texas.[15] Missouri Pacific had proposed a corporate restructuring—*i.e.*, a merger—which contemplated moving those employees and facilities, and in authorizing that merger under what is now Section 11344, the ICC concluded that Missouri Pacific should be relieved of its obligations under that agreement because those obligations were contrary to the public interest as being a burden on interstate commerce. *Missouri Pac. R.R.—Merger,* 348 I.C.C. 414, 430 (1976), *rev'd in part, City of Palestine v. United States, supra.* Since it was clear that an abrogation of that agreement was not necessary to enable the corporate restructuring to be accomplished, the Fifth Circuit concluded that the ICC's decision was in excess of its powers under what is now Section 11341(a); as the court stated in 559 F.2d at 415:

> Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations—even when it serves the general public interest—when the destruction is irrelevant to the success of approved transactions.

That reasoning is clearly in keeping with decisions of this Court which have examined the scope of Section 11341(a)'s exemption, for in those few cases, as the court of appeals in this case observed, this Court has indicated that Section 11341(a) applies "only if those . . . laws pose an obstacle to the transaction." ICC App. at 17a. For example, in *Texas v. United States, supra,* this Court upheld an ICC order which authorized the lease of a railroad incorporated in Texas by a lease agreement that, as modified by the ICC order, authorized the lessee to relocate the lessor's general offices and shops, contrary to Texas law. In upholding that ICC order, however, this Court noted that the Commission's order did not nullify another Texas law which required the carriers to keep a public office in

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[15] Section 11341(a)'s limited reach, even according to the ICC, may also be seen from the fact that the ICC recognizes that this section does not apply to contracts between a carrier and a third party. *St. Louis S. Ry.—Purchase,*

(footnote continues)

(footnote continued)

363 I.C.C. 319, 367 (1980) ("we lack the power to modify trackage rights agreements executed prior to former Section 5(2)(a)'s [now, 49 U.S.C. 11343(a)] enactment in the Transportation Act of 1940"); *see also, Gulf, M. & O. R.R.—Abandonment,* 282 I.C.C. 311, 335 (1952). The Fifth Circuit in its *City of Palestine* decision did not overrule the ICC's view that Section 11341(a) did not apply to contracts, but rather, assumed for purposes of argument that the ICC could abrogate contracts. 559 F. 2d at 414.

Texas where various corporate records were to be maintained for public inspection. By limiting the exemption to solely the general office law—*i.e.*, one which if complied with "would entail unnecessary and burdensome expenditures in operation" (292 U.S. at 533)—this Court noted that: "There is no interference with the supervision of the State over the lessor in matters essentially of state concern, as distinguished from the operations in which their effect upon interstate commerce are of national concern." *Id.* Although petitioners attempt to belittle this Court's similar approach in *Callaway v. Benton*, 336 U.S. 132, 140-41 (1949), and *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 126 (1948) (*see*, MKT Br. at 34-35), petitioners have been unable to point to one case by this Court which squarely holds that Section 11341(a) gives railroads the power to structure their transactions so as to be immunized from laws which do not pose an obstacle to the effectuation of the approved financial transaction.

After being rebuffed by the Fifth Circuit in the *City of Palestine* case, petitioner ICC revised its formulation of when it should immunize a carrier from the operation of other laws.[16] On remand, the ICC noted that the Fifth Circuit's decision contained language which led the Missouri Pacific, in seeking a petition for a writ of certiorari, to describe that appellate court's decision as holding that "the Commission is limited by § 5(11) [now, § 11341(a)] and may nullify state law restraints only where the restraints would stand in the way of or absolutely prohibit a proposed consolidation." *Missouri Pac. R.R. v. City of Palestine* Sup. Ct. No. 77-870, Pet. at 13 (footnote omitted).

[16] Petitioner ICC claims that the court of appeals misspoke when it said that Congress has given the Commission broad powers to immunize transactions from later legal obstacles; according to petitioner, it is § 11341(a) and not the ICC which grants that immunity. ICC Br. at 19-20. Petitioner's semantic dispute is erroneous, for the ICC has stated before that it "can and should immunize" consolidations (*e.g.*, *Union Pac. Corp.—Control, supra*, 336 I.C. at 549), and it has also withheld or limited that section's immunity in other cases. *Sea-Land Service, Inc.—Control*, 348 I.C.C. 42, 59-52 (1975).

However, in the ICC's view that language was merely *dicta*.[17] According to the Commission, the Fifth Circuit's decision "stands for the narrower principle that the Commission may nullify only State law restraints that are materially related to a proposed merger or consolidation within the Commission's jurisdiction." *Missouri Pac. R.R.—Merger*, 354 I.C.C. 763, 764 (1978).[18] Petitioner ICC has applied that formulation of Section 11341(a) to this case. ICC Br. at 41 n.26.

Petitioner ICC's reliance on its "material terms" articulation as to the reach of Section 11341(a), even though erroneous as being too broad, proves two things which negate the ICC's arguments in this case. First, it shows that Section 11341(a) is not totally automatic, for it requires a showing of some degree of necessity over and above the public interest determination. And second, *Burlington Truck Lines, Inc. v. United States, supra*, requires as the court of appeals held, that the Commission supply a reasoned basis for that necessity conclusion. Here, as the the court of appeals noted, the ICC did not provide in this case, either in 1982 or in 1983, "a shred of reasoning to support its view that completion of the [trackage

[17] Such *dicta* included the court's statement that:

> [W]e conclude that the ICC's power only extends to setting aside state restraints to the effectuation of an approved section 5(2) transaction and no further. Although the Palestine Agreement may burden MoPac, the agreement clearly is not an obstacle to the merger . . . and does not threaten the merger's success.

559 F.2d at 414.

[18] The Commission's formulation of its standard in response to the *City of Palestine* decision was not unanimous; Chairman O'Neal took issue with the new formulation and stated:

> In exercising its authority under this section in the future, the Commission should apply a "substantial burden" test, to take jurisdiction in situations where the operation of a State law might not actually stop a section (5) [*sic*] transaction but where it might substantially impair, or reduce the benefits to the public interest resulting from the transaction. If the State law does not impose such a burden, the Commission should not seek to abrogate it.

354 I.C.C. at 765.

rights] transactions required shielding crew selection from the Railway Labor Act." ICC App. at 19a (footnote omitted).

Petitioners cannot avoid that conclusion by contending that the crew provisions of the trackage rights applications were "material terms" (ICC Br. at 41 n.26; MKT Br. at 33, 39-40), for that bare contention, as the court of appeals noted, does not supply the reasoned basis required by *Burlington Truck Lines* in this case. "[M]erely stating in totally conclusory terms that something is a 'material term' is inadequate to provide the basis for the conclusion that waiver is necessary to fruition of the transaction, as § 11341(a) requires." ICC App. at 19a n.7. As the court of appeals explained, this lack of a reasoned basis is "especially conspicuous in light of evidence suggesting that the [crew selection] issues would *not* interfere with the trackage rights." ICC App. at 19a-20a (emphasis in original). As the court summarized (*Id.* at 20a; footnote omitted):

> First, the Commission specifically left the question of trackage compensation open to later negotiation between the railroads, 366 ICC at 589-590; it never suggested why the question of crew selection was somehow so much more necessary to fruition of the transaction that normal Railway Labor Act procedures could not apply to the issue of crew selection. Second, ICC noted that MKT might find it necessary to use more crews than it suggested in its application, 366 ICC at 569-570; again, the Commission never suggested why the question of crew selection was so much more necessary to fruition of the transaction. On both of these issues, then, the Commission expressed a willingness to leave subsidiary trackage issues to later determination. Finally, the Denver & Rio Grande operated for some months with existing Missouri Pacific crews, and there has been no suggestion that the trackage rights were somehow frustrated as a result.

Petitioners' and the dissent's reliance on the fact that the pro-competitive aspects of the trackage rights requires the use

of the trackage rights tenant's own employees (*e.g.*, MKT Br. at 39-40) does not supply the reasoned basis, for essentially two reasons. First, there is no evidence in this record to show that Missouri Pacific employees would not perform the trackage rights operations as efficiently as MKT operating employees would; indeed, the D&RGW's successful use of Missouri Pacific employees belies petitioners' post hoc rationalization on this point. And second, as the court of appeals noted, the "ICC has never given the faintest hint of a reasoned explanation why crew selection is so essential to that purpose that the otherwise applicable provisions of the Railway Labor Act must be waived." ICC App. at 20a n.8. Since the ICC has not adopted petitioners' reasoning, counsel's arguments cannot be used to supply the missing articulated basis. *Burlington Truck Lines, Inc. v. United States, supra,* 371 U.S. at 168-69.

In short, the ICC's own use of Section 11341(a) in this case and in the past shows that the court of appeals was correct in concluding that Section 11341(a)'s immunity does not attach automatically to every proposal made by an applicant in its application to the Commission. Rather, the ICC must supply a reasoned basis to justify a railroad's subsequent claim that Section 11341(a) has relieved it of an otherwise binding obligation because such a grant of immunity is necessary to effectuate the approved financial transaction.

II. Section 11341(a)'s Grant of Exclusive Authority To The ICC Over Railroad Consolidations Does Not Give The Commission Jurisdiction To Regulate Labor Relations, Nor Does It Give That Agency The Power To Relieve A Rail Carrier Of Obligations Which Section 11347 Of The Interstate Commerce Act Requires Be Imposed To Protect The Interests Of Rail Carrier Employees

Besides relying upon their view of the self-executing nature of Section 11341(a), petitioners, the United States and the *amici curiae* go further and assert that the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, must give way to the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, for the need for such

an exemption is clear. That need is clear, petitioners and *amici* assert, because the major dispute[19] resolution procedures—*i.e.*, the procedures which would be applicable in arriving at changes in working conditions after a consolidation transaction is effectuated—are purposefully "long and drawn out" (*e.g.*, *Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966)) and do not insure that the parties will arrive at an agreement since there is no requirement in the Railway Labor Act for compulsory arbitration of such disputes. *See*, ICC Br. at 37-38 n.24. Respondent UTU respectfully submits that petitioners' arguments concerning the interrelationship between the Railway Labor Act and the Interstate Commerce Act are without merit, for these arguments ignore the fact that Congress has not given the Commission the power to regulate a railroad's labor relations. Moreover, any belief that the Commission has such power has been laid to rest by the 1976 amendments[20] to what is now Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, which commands that the fair arrangement which the ICC must impose as a condition of its approval of any rail consolidation to protect the interests of employees, require rail carriers to preserve collective bargaining rights and to give all interested employees a voice in the crew selection process. Consequently, it is simply erroneous to contend, as petitioners do here, that the Commission could approve a transaction which authorizes a rail carrier to ignore its obligations under the Railway Labor Act or under the crew selection process of the ICC imposed employee protective provisions.

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[19] A "major dispute" under the Railway Labor Act is one over the formation of new or modified rates of pay, rules of working conditions which will apply once an agreement is reached. This is to be distinguished from a "minor dispute"—*i.e.*, a dispute over the interpretation or application of an existing agreement—because minor disputes unresolved after conferences between the parties are to be settled by Adjustment Boards which is a form of compulsory arbitration. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945). Major disputes are to be conferenced, mediated and resolved by negotiations and, if necessary, resort to self-help. Section 7, First of the Act, 45 U.S.C. § 157, First, prohibits compulsory arbitration of major disputes.

[20] Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 62, amended Section 5(2)(f) of the Interstate Commerce Act, now § 11347. *See*, page 46, *infra*.

A. The Commission's Jurisdiction Over Rail Consolidations Does Not Give That Agency The Power To Regulate A Rail Carrier's Labor Relations

While Section 11341(a) provides that the ICC's "authority . . . under this subchapter [*i.e.*, Subchapter III of Chapter 113] is exclusive" (49 U.S.C. § 11341(a)), it should be apparent that this exclusive authority extends only to matters over which Congress has given the ICC jurisdiction under the Interstate Commerce Act's consolidation procedures. Indeed, that is the plain import of the language which Congress used in Section 11341(a), both now and since its last substantive amendment on this point in 1940. *See* note 11, *supra*. As pertinent here, that jurisdiction is defined in Section 11343(a) of the Act, 49 U.S.C. 11343(a), where Congress has provided that:

> The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I . . . of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:
>
> (6) acquisition by a rail carrier of trackage rights over . . . a railroad line . . . owned or operated by another rail carrier.

Petitioners give the ICC's jurisdiction a broad reach and assert that approval of a consolidation confers an exemption of sufficient breadth to permit implementation of the "terms" of the transaction as proposed by the carrier in its application for approval. ICC Br. at 28. Petitioners further assert that this exclusive jurisdiction extends to labor relations matters, for they contend that there is a clear need for the Commission "to prescribe the methods for resolving labor issues that might otherwise frustrate transactions that serve the public interest." ICC Br. at 28 n.18. Respondent UTU respectfully submits that the ICC's belief that there is a clear need for it to act as a labor board does not equal congressional approval of such jurisdiction. Indeed, Congress has spoken on this subject by enacting the Railway Labor Act, and that Act, which regulates labor

relations in the rail industry, does not give the ICC any role in enforcing or prescribing that regulation.[21]

Petitioners' view that there is an overlap of jurisdiction by virtue of the ICC's jurisdiction over consolidations is inaccurate, for the legislative history of the rail consolidation provisions of the Interstate Commerce Act shows that Congress has always viewed the ICC's jurisdiction as not extending to labor relations matters. Railroads have been subject to federal regulation as an industry for almost 100 years (*see*, Act of February 4, 1887, 24 Stat. 379), and during virtually that same time period, Congress has also regulated rail labor relations. *E.g.*, Arbitration Act of 1888, 25 Stat. 501. Rail regulation by the ICC became more extensive after the railroads were returned to private ownership by the Transportation Act of 1920, 41 Stat. 456, but Congress has never given the ICC control over labor relations matters, even though such control has been proposed on several occasions. *E.g.*, H.D. Wolf, THE RAILROAD LABOR BOARD, Chap XV (University of Chicago Press, 1927).

Although Congress has long recognized that stable labor relations are essential to an efficient national rail transportation system and that there is an overlap between this goal and sound financial regulation by the ICC (*e.g., United States v. Lowden*, 308 U.S. 225, 235-36 (1939)), Congress has nevertheless treated the two forms of regulation separately. For example, while Title IV of the Transportation Act of 1920 made extensive amendments to the Interstate Commerce Act, including adding for the first time the predecessor of what is now Section 11341(a), Title III of that Act created the Labor Board to investigate and to report on rail labor disputes; it provided for voluntary adjustment boards to consider minor disputes; and it required both rail labor and management to exert every reasonable effort to avoid any interruption to the operation of

[21] Congress gave the ICC, however, a limited role under the Railway Labor Act. First, the ICC is to determine whether an electric powered railroad is a "carrier" within the meaning of Section 1, First of the Act, 45 U.S.C. § 151, First. And second, the ICC is to establish classifications of employees, but is not to define the crafts according to which employees may be organized. 45 U.S.C. § 151, Fifth.

any carrier. 41 Stat. at 469. There is no indication in the Transportation Act of 1920 that Congress also intended to give the ICC exclusive jurisdiction over labor relations matters to the exclusion of the Labor Board or adjustment boards, when it first enacted in that Act what is now Section 11341(a). Indeed, by placing the two forms of regulation in separate titles of that Act, it must be presumed that the ICC's exclusive authority over consolidations did not include jurisdiction over labor relations matters.

This separateness between the two forms of regulation is borne out by the Emergency Railroad Transportation Act of 1933 [hereinafter, "ERTA"], 48 Stat. 211. As shown above (*see* note 11, *supra*), Congress reenacted in Section 202 of that Act what is now Section 11341(a) as part of its grant of jurisdiction to the ICC over railroad consolidations. *See, Texas v. United States, supra*, 292 U.S. at 534-35. That Act also created the office of the Federal Coordinator of Transportation who was given the specific authority "to encourage and promote or *require* action" on the part of railroads to "avoid unnecessary duplication of services and facilities . . . [and] avoid other wastes and preventable expense . . . ." Section 4 of ERTA, 48 Stat. at 212 (emphasis added). Congress also gave orders of the Coordinator an immunity similar to that reenacted for ICC consolidation orders, but it specifically limited that immunity in several respects. First, laws "for the protection of the public health or safety" were not to be waived; and, as relevant here: "[N]othing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." Section 10(a), ERTA, 48 Stat. at 215; *see also*, Section 10(b), 48 Stat. at 215.

Petitioner MKT asserts that Congress' failure to include in what is now Section 11341(a) an express statement that the ICC's immunity power does not extend to the Railway Labor Act, is "an evident recognition of the fact that no such exception was implicit in" what is now Section 11341(a). MKT Br. at 24. That assertion is erroneous, for petitioner MKT has failed to

take into account the broader jurisdiction which the Coordinator had, as compared with that given to the ICC. As this Court has stated before:

> From the initial enactment in the Transportation Act of 1920 . . ., to the most recent comprehensive re-examination of these provisions in the Transportation Act of 1940 . . ., Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad. . . . The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged.

St. Joe Paper Co. v. Atlantic Coast Line R.R., 347 U.S. 298, 305 (1954). Moreover, in passing on the validity of a consolidation transaction proposed by the railroads, the Commission's jurisdiction is limited to the financial transactions specified in Section 11343(a). The Coordinator, however, had the authority to require carriers to take certain actions and his jurisdiction ran to all matters which could permit railroads to operate more economically.

Congress recognized the Coordinator's broader jurisdiction could cover labor relations matters and it provided certain protections for employees, including advance notice of orders which will affect the interests of employees (Section 7(a)); a prohibition on reductions in number of jobs by reason of any action taken pursuant to the authority of the Coordinator (Section 7(b)); a guarantee against individual employees being deprived of employment or placed in a worse position with respect to compensation by reason of any action taken pursuant to authority of the Coordinator (*Id.*); and a specific recognition that the Coordinator's orders did not supersede the Railway Labor Act. Section 10(a). A comparable limitation on the scope of what is now Section 11341(a)'s immunity as not affecting Railway Labor Act rights was not necessary, for the simple reason that Congress had not even arguably given the ICC jurisdiction over labor relations matters.

Petitioners seek to find that jurisdiction by referring to the requirement in Section 11344(b)(1)(D) of the Interstate Commerce Act, 49 U.S.C. 11344(b)(1)(D), that in considering the public interest in certain consolidation proceedings, the ICC must consider "the interest of carrier employees affected by the proposed transaction." ICC Br. at 28 n.18. Petitioner MKT also refers to the passage of what is now Section 11347 during Congress' consideration of the Transportation Act of 1940 and argues that Congress' rejection of the Harrington Amendment [22] shows that Congress intended to allow carriers to implement consolidations irrespective of the fact that the ICC's approval might result in the unilateral alteration of working conditions "as long as those employees were compensated fairly under the Commission's labor protective conditions." MKT Br. at 31. Those assertions are without merit, for the Transportation Act of 1940 required the ICC to consider as part of its public interest determination the impact of the proposed transaction on employees, and to impose a fair and equitable arrangement "*to protect* the interests of the railroad employees affected" by the transaction. Section 7 of the Transportation Act of 1940, 54 Stat. 899, 906-07, adding 49 U.S.C. 5(2)(b) (emphasis added). It did not authorize the abrogation of employee rights.

Those concepts were not new in 1940, for the Commission had recognized since 1934 that the impact of a transaction on employees was an integral part of the public interest to be considered in deciding whether to approve a transaction (*St. Paul Bridge & Terminal Ry.—Control*, 199 I.C.C. 588, 596 (1934)), and for several years prior to 1940, it was imposing an arrangement to protect employee interests as a condition of its

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[22] Representative Harrington proposed that the Commission could not approve a transaction "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882 (1939). Rep. Harrington's amendment was eventually rejected and in its stead Congress included a requirement that the protective arrangement required to be imposed by Section 5(2)(f) as added by the Transportation Act of 1940 must provide at the minimum that affected employees receive at least a four year guarantee against being placed in a worse position with respect to compensation. *See, Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 174 (1961).

consolidation approvals. *See, United States v. Lowden, supra.* Employee interests were considered and protected, not because employee protection was the price to be paid to allow a rail carrier to change rates of pay, rules or working conditions, but rather, because Congress had determined that it was not in the public's interest for rail employees to provide the economic benefits which consolidations could achieve for railroads. *ICC v. Railway Labor Executives' Assoc.*, 315 U.S. 373, 377-79 (1942); *United States v. Lowden, supra,* 308 U.S. at 235-36. Requiring the ICC to consider and to protect the interests of employees is far different than allowing the Commission to authorize new rates of pay, rules, or working conditions, for the former is directed to the parties seeking ICC approval of a consolidation transaction—*i.e.*, the carriers—whereas the latter requires the ICC to direct rail labor to take certain action. As the ICC has said before:

> [U]nder section 5 of the Act [now § 11341, *et seq.*] we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction. . . .
>
> Under section 5(2)(f) of the Act, we are "required" to impose upon the carriers in each approved transaction conditions for the protection of railroad emplyees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything . . . .

Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, supra, 295 I.C.C. at 701. Congress, respondent UTU respectfully submits, intended labor relations matters arising from a consolidation to be resolved by the procedures of the Railway Labor Act. *See generally, Air Line Pilots Assoc. v. CAB*, 667 F.2d 181 (D.C. Cir. 1981); *Delta Air Lines, Inc. v. CAB*, 543 F.2d 247, 260 (D.C. Cir. 1976)(Civil Aeronautics Board's jurisdiction over airlines does not extend to safety matters which are subject to jurisdiction of Federal Aviation Administration).

Respondent UTU's position that the ICC does not have jurisdiction over labor relations matters is supported by the ICC's treatment of the supposed conflict between the Interstate Commerce Act and the Railway Labor Act prior to 1983. Between 1940 and 1983, rail carriers occasionally argued before the Commission that the Interstate Commerce Act, by virtue of what is now § 11341(a), relieved the railroad of the obligations under the Railway Labor Act. However, in each case the ICC refused to find such a result. For example, in *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, supra,* the carrier which leased and operated the properties of another railroad pursuant to an ICC order, sought a ruling by the Commission that the order had relieved it of whatever obligation the Railway Labor Act, and in particular, Section 6 of the Act, 45 U.S.C. § 156, might impose upon it to negotiate with employees over the manner in which it would integrate its operations with those of the leased carrier. According to the railroad, its original application had proposed an integration of the physical operations and the ICC's order was premised upon that assumption. 295 I.C.C. at 699. Consequently, the carrier asserted, what is now Section 11341(a) applied and relieved it of its obligations under Section 6 of the Railway Labor Act. 295 I.C.C. at 698-99. The carrier's request for a declaration that it was relieved of its Railway Labor Act obligations was denied. 295 I.C.C. at 702. After stating that it found nothing in the Act's consolidation provisions and, in particular, in the immunity provision, which "authorizes us to determine and declare the particular laws" immunized, the ICC added:

> Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western [*i.e.*, the carrier] requests us to do.
>
> It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or

> operated by the Omaha, and this has been accomplished.

Here, as in the *Chicago, St. Paul* case, it is apparent that the Railway Labor Act would not prevent the trackage rights tenants from effectuating the financial transaction authorized—*i.e.*, the transfer of the right to operate over the lines of the Missouri Pacific and Union Pacific.

In *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151 (1967) (Report on Remand), the ICC was faced with an assertion by the Southern Railway that the Commission's control order and the employee protection imposed by that order superseded whatever rights collective bargaining agreements gave to employees. 331 I.C.C. at 168. That assertion was rejected by the Commission:

> [U]nder section 5(2)(f), we impose formulae of protective conditions *upon the carriers* seeking specific permissive authority under section 5(2) of the act, the purpose being to *protect* the interests of employees some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act. Rights obtained by employees under section 5(2)(f) are the minimum protection which an applicant carrier must provide in order to obtain this Commission's approval of its transaction. They are not, however, the maximum rights employees may gain. . . . The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carrier under section 5(2)(f) are independent, separate, and distinct rights. . . . The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees. . . . These protective conditions imposed upon carriers under section 5(2)(f) which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their

> adjustments of labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. . . .
>
> . . . By its terms, section 5(11) [now, Section 11341(a)] applies only to antitrust and other restraints of law from carrying "into effect the transactions so approved . . .". Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms. . . . The essential problem to be resolved is an accommodation of laws, a role not foreign to us in section 5 transactions. . . . When balancing the national policy as to transportation with that of labor relations, we "act in a most delicate area . . . [and] policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other." . . .
>
> The designated "exclusive and plenary power" of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws—be they statutorily created antitrust laws or voluntary contractual agreements made binding by the force of law. . . .

Southern Ry.—Control—Central of Ga. Ry., supra, 331 I.C.C. at 169-70 (emphasis in original). *See also, Norfolk & Western Ry.—Merger*, 347 I.C.C. 506, 511 (1974). Respondent UTU is not aware of one case prior to the case at bar in which the ICC held that the Railway Labor Act was an obstacle to a transaction and must give way to the Interstate Commerce Act.

Respondent UTU's position as to the limited nature of the ICC's exclusive jurisdiction under Section 11341(a) is supported by the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra*, in which the railroads sought to enjoin a strike by rail labor over the carriers' refusal to negotiate under the Railway Labor Act changes in

working conditions resulting from an ICC approved consolidation transaction. 307 F.2d at 158. As the Fifth Circuit observed, the railroads included in their application to the ICC "such detail . . . as to determine the major provisions of a new labor contract [to govern the new operations], although at no time were the unions brought into the negotiation of these agreements." *Id.* As occurred here (*Id.*):

> The appellants then argue that ICC approval of the agreements makes them binding on the unions. If so, not only does section 5 give the Commission power to approve a section 5(2) transaction, but it gives the carriers the right to legislate the terms of a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission. We do not feel the statute may be so interpreted.

To support their arguments that the Interstate Commerce Act supersedes the Railway Labor Act, petitioners rely upon *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). In that case, the court did conclude that Section 11341(a)'s predecessor relieved a carrier of its Railway Labor Act obligations (314 F.2d at 432), but the facts relied upon by the court substantially lessen its value to petitioners in this case. In *Chicago & North Western*, the Eighth Circuit was faced with the question of whether the BLE was bound by an agreement which its representative had entered into to protect employees affected by the ICC approved transaction. 314 F.2d at 427. That agreement provided for arbitration of seniority integration disputes. *Id.* The BLE asserted that the arbitration provision of that agreement did not apply, but rather, it contended, the carriers had to comply with the Railway Labor Act's major dispute procedures to resolve the integration dispute. 314 F.2d at 428. Relying upon those facts (314 F.2d at 434), the Eighth Circuit held that the BLE was barred by what is now Section 11341(a) from asserting that the Railway Labor Act prohibited enforcement of the arbitration provision to which it had agreed. 314 F.2d at 433. In reaching that conclusion, the Court noted that: "In effect the stipulation [*i.e.*, protective agreement]

provides substantially the same machinery for arbitration that exists under § 7 of the Railway Labor Act . . . ." *Id.* That same observation is not true in this case.

Disregarding its pre-1983 consistent view of its limited role over labor relations, petitioner ICC contends that the employee protective provisions imposed under 49 U.S.C. § 11347 "ensure that inability of the parties to agree upon changes in working conditions necessary to Commission-approved transactions will not prevent the approved transaction from being implemented." ICC Br. at 34 n.21. That result is achieved, petitioners contend, by the fact that in their opinion the protective conditions provide for the compulsory arbitration of changes in rules and working conditions which the carrier wishes to make in implementing the operational changes associated with a transaction approved by the ICC. ICC Br. at 37-38 n.24. Besides being a very recent position of the ICC (*see, In re Norfolk & Western Ry., et al.*, Arbitration under Art. 1, § 4 of *New York Dock* conditions (N.H. Zumas, Referee) (a copy of that arbitration award is reproduced hereto as Appendix A)), that view of the ICC's authority over labor relations is erroneous and graphically shows the error of the Commission's construction of its authority under Section 11341(a).[23]

In the ninety-eight years that Congress has been regulating rail labor relations, Congress has refused to compel the arbitration of major disputes. Indeed, Section 7, First of the Railway Labor Act, 45 U.S.C. § 157, First provides: "That the failure or refusal of either party to submit a controversy [over rates of pay, rules, or working conditions] to arbitration shall

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[23] As the ICC has explained before, employee protective conditions are imposed on *carriers* and not employees. Those conditions, the UTU submits, supplement existing employee rights and give rail employees on one carrier involved in a transaction the right to require other carriers to bargain with them over the selection of forces. This cross-carrier bargaining right does not exist under the Railway Labor Act. *Central Vermont Ry. v. BMWE*, D.C. Cir. No. 86-5245, decided May 14, 1986, opinion issued June 27, 1986. If rail labor exercises that cross-carrier bargaining right, it does so with the knowledge that disputes over the terms of the selection of forces agreement unresolved by negotiation must be arbitrated. Respondent UTU submits that until this case, it was well recognized that such an arbitration could not modify existing agreements. Appendix A at 16a.

not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise." Also, Congress has concluded that in order to encourage compromise, which is inevitably necessary to reach an agreement, neither rail management nor labor can change the status quo during the negotiation and mediation phases of the compulsory bargaining. 45 U.S.C. §§ 152, Seventh, 155, First and 156. Those status quo requirements are, as this Court has stated, central to the design of this labor statute. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 150 (1969). As this Court has explained:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce . . . .

Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6 (1943) (footnote omitted).

Whether judged by Section 11341(a) or by general conflict of laws principles, it is clear that the Interstate Commerce Act does not conflict with the Railway Labor Act, for the goals of both are compatible. As this Court has stated before, repeals by implications "are not favored" (*e.g., Morton v. Mancari*, 417 U.S. 535, 549 (1974)) and will not be found to exist unless the intention of the legislature to repeal is clear and manifest. *Watt v. Alaska, supra*, 451 U.S. at 267. Indeed, federal courts "must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Id.* Here, petitioners have made no attempt to read the Interstate Commerce Act's

consolidation provisions together with the commands of the Railway Labor Act, but the fact that the two Acts have existed side-by-side without a conflict for more than fifty years prior to this case shows that the two Acts can be read so as to give effect to each.

Imposed changes, such as those mandated in this case by the ICC, or even arbitrated changes imposed over the objections of employees as occurred in the arbitration award attached to this brief as Appendix B (*In re Norfolk & Western Ry., et al.*, Arbitration under Art. 1, § 4 *Mendocino Coast* conditions (R.J. Ables, Referee)), are contrary to the Railway Labor Act. More important, they bring with them a threat to uninterrupted commerce and a "loss of employee morale when the demands of justice are ignored." *United States v. Lowden, supra*, 308 U.S. at 236. Both results are contrary to the goals of the Interstate Commerce Act. *See, ICC v. Railway Labor Executives' Assoc., supra*, 315 U.S. at 377. As this Court has explained before in a comparable situation:

> The Commission acts in a most delicate area here [*i.e.*, a strike situation where it was asked to certify a replacement motor carrier], because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other.

Burlington Truck Lines, Inc. v. United States, supra, 371 U.S. at 172-73. Unfortunately, by concentrating solely on a speedy implementation of all aspects of an approved transaction, and by ignoring the limits of its jurisidiction, the ICC has made no attempt to accommodate the policies of the two statutes.

B. Section 11347 Prohibits The ICC From Relieving A Carrier Of Its Railway Labor Act Obligations

Whatever questions may have existed as to whether the ICC had jurisdiction over labor relations matters were laid to rest by the 1976 amendments to the Interstate Commerce Act. In 1976, Congress made extensive revisions to the Interstate

Commerce Act in the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31, including an amendment to what is now Section 11347 to require the Commission to increase the levels of protection which it routinely imposed in consolidation cases.[24] 4R Act, § 402(a), 90 Stat. at 62. That amendment provided that the arrangement which the ICC was to impose in all consolidation approvals "shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." 90 Stat. at 62.

As it now reads, Section 11347 requires the ICC to condition *all* rail consolidation approval orders by requiring the applicants "to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." 49 U.S.C. § 11347. According to the ICC, the employee protective provisions imposed in 1982 provide those minimum levels of protection. Since Section 11341(a) immunizes carriers from federal laws "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission" (Section 7 of Transportation Act of 1940, adding 49 U.S.C. § 5(11), 54 Stat. at 908), it follows that Section 11341(a) cannot relieve carriers of whatever obligations are imposed upon them pursuant to Section 11347.

Those obligations include the requirement in Article 1, Section 4 of the current employee protective conditions that rail carriers participating in a transaction, which may cause the rearrangement of forces, shall give advance notice of the "transaction"—*i.e.*, the acquisition of trackage rights or, in purchase, merger and control cases, any action taken pursuant to authorization of ICC (Art. 1, § 1(a), 354 I.C.C. at 610; 360

[24] Congress also made employee protection mandatory in abandonment cases under what is now 49 U.S.C. § 10903 and required the same levels of protection as it added to the consolidation provisions. 4R Act, § 802, 90 Stat. at 127-28.

I.C.C. at 84)—and, if requested, must negotiate an agreement to "provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case . . . ." Art. 1, § 4 of *Norfolk & Western* conditions, 354 I.C.C. at 610. As the Commission's decision in the *Southern Ry.—Control, supra,* case shows, that notice must be given to employees of all carriers involved in the transaction. A failure to give that notice has devastating effects on the employees excluded, and, thus, the notice and subsequent negotiation are an "indispensable prerequisite" to a valid order of approval under the consolidation provisions of the Act. 331 I.C.C. at 166. Moreover, the 1976 amendments require the imposition of those provisions established under Section 405(b) of the Rail Passenger Service Act, 45 U.S.C. § 565(b) to "preserv[e] . . . rights, privileges, and benefits . . . to such employees under existing collective-bargaining agreements or otherwise; [and] (2) [to] continu[e] . . . collective-bargaining rights . . . ." Article 1, Section 2 of the employee protective conditions implements that requirement by providing that:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

Art. 1, § 2 of *Norfolk & Western* Conditions, 354 I.C.C. at 610. Both of those requirements (*i.e.*, Art. 1, §§ 2 and 4 of the *Norfolk & Western* conditions) are derived from, and indeed are virtually identical to, provisions established pursuant to Section 405 of the Rail Passenger Service Act—*i.e.*, the Appendix C-1 conditions—and are, thus, minimum levels of protection which are required to be imposed as a condition on any consolidation appoval. *E.g., Railway Labor Executives' Assoc. v. United States, supra,* 675 F.2d at 1251; *New York Dock Ry. v. United States, supra,* 609 F.2d at 94; *accord, Railway Labor Executives' Assoc. v. United States,* 339 U.S. 142 (1950).

As the unambiguous language of Article 1, Section 2 of the employee protective conditions shows, railroads involved in a

transaction upon which that condition has been imposed must implement the approved transaction in such a manner so as to preserve existing collective bargaining rights and agreements of employees, including employee rights under the Railway Labor Act. Although railroads have urged implementing agreement arbitrators since the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, to modify existing collective bargaining agreements, those arbitrators, until 1983, had almost uniformly concluded that they did not have such jurisdiction, mainly because of Article 1, Section 2 of the employee protective conditions. *E.g.*, App. A at 16a. That construction of Article 1, Section 2 is clearly consistent with its "legislative history," for as the *amici* have shown, the statutory predicate for Article 1, Section 2—*i.e.*, 45 U.S.C. § 565(b)(1) and (2)—was derived from Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c). Amici Br. at 27. As the *amici* concedes (*id.*), the purpose of Section 13(c)'s collective bargaining rights requirement was to require the companies involved in a transfer "to preserve" those rights, not to facilitate their abrogation.

In this case, the ICC noted, "standard labor protection conditions generally preserve working conditions and collective bargaining agreements." ICC Decision of October 25, 1983, at 6; ICC App. at 59a. However, the ICC then qualified that correct reading of the protection by stating that:

> The terms of those conditions . . . must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction.

Id. at 59a-60a. That view of the relationship between collective bargaining rights and the effect of an ICC order is clearly based on the Commission's erroneous belief that it has jurisdiction over labor relations matters and that Section 11341(a) operates to relieve a carrier of any Railway Labor Act obligation that might impede implementation of the transaction in the manner

proposed by the carrier. Respondent UTU respectfully submits that the Commission's expansive view of its authority totally fails to recognize that the 1976 amendments to what is now Section 11347 prohibit it from approving any consolidation transaction which the applicants intend to implement in a manner that abrogates collective bargaining rights. Consequently, it is erroneous to assert that collective bargaining rights must give way to implementation of a transaction approved by the Commission.

Petitioner MKT and *amici* argue that if Congress had intended the 4R Act to have such a major intent on the ICC's jurisdiction over consolidations as respondent UTU urges, there would have been some reference to that impact in the Act's legislative history. Since, they believe, Congress was totally silent on this issue, Congress, they assert, could not have intended such a limitation on the ICC's jurisdiction. *E.g.*, Amici Br. at 26. *Amici* and petitioner MKT, however, have approached Congress' "silence" in 1976 with an erroneous view of pre-1976 law, for they ignore the fact that the ICC's 1967 *Southern Ry.—Control* decision represented the ICC's longstanding interpretation of its authority, and they fail to recognize that prior to 1983 rail labor had never been forced to arbitrate work rule changes as has occurred since the ICC's decision in this case. *See*, App. B. As this Court has noted before: "In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

Here, however, Congress was not totally silent, for it was urged by rail labor to require the ICC to improve its protective conditions (*e.g.*, Railroads—1975: *Hearings on S.793, et al., Before Senate Committee on Commerce*, 94th Congress., 1st Sess. at 1105 (1975) (Statement of William G. Mahoney)), and it granted rail labor's request because: "If we are to have a fair rationalization of the rail system in the United States, then adequate protection of jobs must be afforded those who choose a career in railroad jobs." H. Rpt. No. 94-725, 94th Cong., 1st Sess. at 75 (1975) (commenting on amendment to abandonment provisions). The amendments which Congress enacted in

1976 clearly required all subsequent ICC protective conditions to preserve and to continue collective bargaining rights. Congress' intent could not have been clearer.

On the other hand, if Congress intended in 1976 or 1940 to give the ICC jurisdiction over labor relations matters and to require compulsory arbitration or the unilateral abrogation of rules and agreements, that would have been a major change in policy which should require a clear expression of congressional intent before it can be implied. *Watt v. Alaska, supra,* 451 U.S. at 270-71; *Edmonds v. Compagnie Generale Transatl.,* 443 U.S. 256, 266-67 (1979). Since no such expression of congressional intent to abandon almost a century old policy of not compelling arbitration of major disputes can be found in the numerous Acts of Congress modifying the Interstate Commerce Act, it is improper to conclude, as petitioners do, that Congress has given the ICC such an abhorent power.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be affirmed and this case should be remanded to the ICC with instructions to give full recognition to the requirements of 49 U.S.C. § 11347.

Respectfully submitted,

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Date: August 15, 1986

APPENDIX A

In the Matter of Arbitration Between

NORFOLK AND WESTERN RAILWAY COMPANY

and

ILLINOIS TERMINAL RAILROAD COMPANY

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

and

UNITED TRANSPORTATION UNION

Finance Docket 29455

OPINION AND AWARD

Background

This is an arbitration proceeding pursuant to the provisions of the *New York Dock* Labor Protective Conditions (under Article I, Section 4), imposed by the Interstate Commerce Commission in Finance Docket Number 29455.

Hearing was held at St. Louis, Missouri on November 11, 1981, at which time oral argument was heard and exhibits offered and made part of the record.

In addition to the submissions presented at the hearing, the parties agreed to file post-hearing submissions and reply submissions. The post-hearing submissions of Carriers and UTU were received on November 25, 1981. Because of an incorrect mailing address, the post-hearing submission of BLE was not received until December 2, 1981.

Carriers were represented by R. D. Kidwell, System Director Labor Relations and M. M. Lucente, Esq. The UTU was represented by Vice Presidents C. L. Caldwell and H. G. Kenyon, and W. G. Mahoney, Esq. The BLE was represented by Vice President E. E. Blakeslee.

Statement of the Case

On June 22, 1981, the Interstate Commerce Commission (ICC) authorized the acquisition of the Illinois Terminal Railroad Company (IT) by the Norfolk & Western Railway Company (N & W). The acquisition authorization was conditioned upon the N & W's agreement to accept the provisions of the *New York Dock II (New York Dock Railway-Control—Brooklyn Eastern District,* 360 I. C. C. 60 (1979).

Article I, Section 4 of the New York Dock Conditions require that subsequent to Carriers' serving a 90 day notice of the intended transaction, the parties endeavor to negotiate an implementing agreement under which the employees will work after the implementation of the consolidation.

On July 29, 1981, Carriers' served the required notice on the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU) of their intent to "unify, coordinate and/or consolidate their respective operations" on or after November 1, 1981. After serving the requisite notice, the parties met on several occasions in an effort to reach agreement under which the employees would work upon implementation of the consolidation. The parties were unable to reach agreement, and Carriers then advised the Organizations that all proposals made (except Carriers' original proposal) were withdrawn; and that Carriers were invoking arbitration pursuant to Article I, Section 4 of the New York Dock Conditions.

The pertinent portions of the July 29, 1981 Notice by Carriers read:

> "As a result of the Carriers' excercise of the above-described authority, it is intended to unify, coordinate and/or consolidate facilities used and operations and services presently performed separately by Illinois Terminal Railroad Company and Norfolk & Western Railway Company.
>
> It is intended that all train and engine service employees represented by the Brotherhood of Locomotive Engineers or the United Transportation Union will, on the effective date of the unification, coordination and/or consolidation, be integrated into an appropriate single seniority roster and that such employees will be employees of NW and will be available to perform service on a coordinated basis subject to currently applicable NW (former Wabash) agreements."

Carrier's initial Implementing Agreement dated August 31, 1981, was a proposal involving BLE only, and excluded UTU. That Agreement read in pertinent part:

> "Article I
> Section 1
>
> (a) Except as provided as in (b) below, the names and seniority dates of the active IT engineers (all who are working as engineer or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) will be dovetailed with the active NW engineers (all who are working as engineer, fireman or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) on St. Louis Terminal. Thereafter, the inactive (not working or do not stand to work as engineer, fireman or hostler) IT engineers names will be dovetailed with the inactive NW engineers on St. Louis Terminal and the combined inactive group will then be placed on the bottom of the previously dovetailed active group of engineers. This will constitute the new NW consolidated St. Louis Terminal Roster.
>
> (b) IT engineers electing not to have their names and seniority dates dovetailed into the St. Louis Terminal Roster will advise the Carrier within ten (10) days of the effective date of this Agreement of the NW's Decatur Division road or yard roster, excluding roster of Forrest District and Hannible-Quincy Yards, on which they elect to have their names and seniority dates dovetailed, and their names will be removed from said St. Louis Terminal Roster.

Article II—Schedule Agreement

Upon implementation of this Agreement, all engineers in the consolidated seniority districts will be subject to the applicable Schedule Agreement in effect on the former Wabash, except as specifically provided herein.

* * * *

Article XIV

This Agreement, while bearing the signature of the United Transportation Union General Chairman who formerly represented engineers on the former Illnois Terminal Railroad Company is hereafter recognized as an agreement between Norfolk and Western Railway Company and Brotherhood of Locomotive Engineers only."

In summary, Carriers' proposed Implementing Agreement would:

(1) Dovetail the seniority of employees on a two-tiered basis (active with active, inactive with inactive)

(2) Place the IT employees under the N & W (Wabash) schedule agreement, and

(3) Transfer the representation of the IT employees from UTU to BLE.[1]

Issues To Be Resolved

The parties are in agreement that there are two essential issues to be resolved in this dispute:

1. Does this Board have the authority under New York Dock Conditions to change the provisions of existing

[1] Carriers reject the third contention, asserting that the Board is not being asked to alter representation rights. Carriers state: "The Illinois Terminal engineers represented by UTU constitute a minority of the employees of the craft of engineers in the post-consolidation NW system. As such, UTU must apply for certification to represent engineers of the consolidated NW system, regardless of which agreements remain in effect."

collective bargaining agreement, i.e. the authority to terminate the IT—UTU agreement and remove the IT engineers from UTU's jurisdiction.

2. Is the Carriers' proposal to dovetail seniority rosters (active with active and furloughed with furloughed) a fair and equitable method of combining the N & W—IT work of locomotive engineers.

Position of the Carriers

Carriers argue that the consolidation proposal, particularly the provision for the placement of all employees under one N & W schedule agreement, is the only proposal that will effectively achieve the purpose and intent of the ICC order. Otherwise, Carriers argue, N & W will have to live indefinitely with two separate and distinct work forces—"One still operating under N & W rosters and rules and one still dependent on IT's rosters and rules even though IT and its operations have disappeared."

Carriers argue that the arbitrator's authority under Section 4 of the *New York Dock* Conditions includes the power to change the provisions of existing collective bargaining agreements. Carriers assert that the arbitrator's authority is consistent with the principal enunciated by the ICC in *Southern Railway—Control-Central of Georgia*, 331 ICC 165: "That the very purpose of the first and landmark set of merger protection conditions—the Washington Job Protection Agreement (WJPA)—was to provide a basis for 'superseding' existing agreements in order 'to avoid . . . the prohibitions against transfering work from one railroad to another contained in collective bargaining agreements . . .' While Carriers agree that the ICC in *Southern Railway-Control* that agreements were not automatically cancelled by a merger order, they argue that the ICC "prescribed Sections 4 and 5 of the Washington Job Protection Agreement as conditions of the merger in order to provide a mechanism by which agreements could be changed," and that Sections 4 and 5 (which formed the basis for Section 4 of the *New York Dock Conditions*) "required Carriers and labor organizations to negotiate over 'each plan of coordination

which results in the rearrangement of forces' "and that in the event that the parties failed to agree, both Section 5 of the Washington Job Protection Agreement and Section 4 of *New York Dock,* a 'superseding process' through arbitration."

Carriers refer to the New York Dock decision[2] (Which expressly refers to the consolidation of seniority rosters as a change that is subject to its procedures), and quotes the Commission's statement that "any future related action taken pursuant to an approval (i.e., consolidation of rosters as a result of the control) will require full and literal compliance with the conditions," and urge that "where seniority rosters and work are consolidated, it necessarily follows that rules *must* be consolidated and made uniform as well. Otherwise, the absurd situation of employees working at the *same* time on the *same* crew under a different set of work rules would result."

(Underscoring provided.)

Carriers reject the Organizations' contention that Section 2 of the *New York Dock* Conditions does not allow changes in agreement through the arbitration process. Section 2 reads:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

Carriers argue that the arbitration process set forth in Section 4 is an integral part of the collective bargaining process that results eventually in an agreement voluntarily negotiated between the parties or an agreement prescribed by arbitration. Even though arbitration might be required, this does not change the character of the ultimate product, namely, a collective bargaining agreement; thus meeting the requirements of Section 2 of the *New York Dock* Conditions with respect to the procedures for changing existing collective bargaining agreements. In support of their argument, Carriers rely on the

[2] *New York Dock Railway-Control-Brooklyn E.D.T.* 360 ICC 60 (1979).

Seidenberg Award involving the Yardmasters, Conrail and the Detroit Terminal Company.

Finally, Carriers argue that the consolidation of seniority rosters and the placement of the N & W and IT work forces under the N & W Wabash agreements are necessary to carry out the transaction authorized by the ICC. Without a consolidation of seniority rosters and a unification of schedule agreements, Carriers contend they could not accomplish the central features of the application approved by the ICC. Carrier states: "IT positions *will not* become NW positions and IT'S operations *will not* be fully consolidated with NW's operations. Instead, an inconsistent and obstructive aspect of IT's former operations will survive and impede the consolidation. NW will be forced to manage the physically consolidated NW-IT properties with an unconsolidated NW-IT work force."

With respect to the question of the method of consolidating the seniority rosters, Carriers contend that the dovetailing as proposed is the most fair and equitable method of putting the rosters together. Carriers assert:

> "It would tend to keep the same employees working subsequent to consolidation that are working today. Furthermore, those presently active engineers who possibly would be furloughed subsequent to consolidation through a reduction in assignments would be the first group returned to active status by atrition of senior engineers or an increase in total number of assignments."

Carriers reject the "equity proposals" as being too difficult to administer and creating confusion and ill will among the involved employees.

Position of the Organizations

Both the UTU and BLE argue that an arbitrator does not have the authority to terminate the IT-UTU Agreement and place the IT engineers under the N & W-BLE (Wabash) Agreement. The Organizations argue that the arbitrator's jurisdiction under Article I, Section 4 of the *New York Dock* Conditions is limited to determining the implementing agreement provisions having direct application to the basic employee

protections arising from the immediate transaction and to the selection and assignments of employees affected by the transaction. Unless such jurisdiction is specifically and unequivocally given, an arbitrator may not write an collective bargaining agreement for the parties.

The Organizations argue that the arbitrators authority in this case, arising from Article I, Section 4 of the *New York Dock Conditions,* is limited. Section 4 requires "each railroad contemplating a transaction which is subject to [the New York Dock] conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces" to give advance written notice thereof to the employees and their bargaining agents which notice must "contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes." Before Carriers can consummate the transaction, the parties are required to negotiate an "agreement with respect to the application of the terms and conditions of this appendix", (Appendix III to the Commission's Order in *New York Dock*) and further providing "for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case." Thus, if the parties cannot agree upon the employee protections contained in Appendix III or the basis for the selection of work forces, the dispute may be submitted to arbitration for adjustment. The limited nature of an arbitrator's authority is further confirmed by Section 2 of the *New York Dock* conditions. In Section 2, the Commission preserves and continues the application of existing collective bargaining agreements when it states:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, priveleges and benefits (including continuation of pension rights and benefits) of the railroads employees under applicable laws and/or existing collective bargaining agreements or otherwise *shall be preserved unless changed by future collective bargaining or applicable statutes.*" (Underscoring added)

When Section 4 is read in conjunction with Section 2, the Organizations argue, "the limitation on an arbitrator's authority is placed beyond serious argument."

The Organizations argue further that, in addition to the preservation of existing agreements found under the provisions of Section 2 of the *New York Dock Conditions,* Sections 2, Seventh and 6 of the Railway Labor Act prohibit the Carriers from abolishing bargaining agreements; and that a collective bargaining agreement subject to the provisions of the Railway Labor Act cannot be revised except through the procedures of a Section 6 Notice and the other mandatory provisions of the Railway Labor Act. Since the Organizations have not agreed to any changes in the working agreements of the employees they represent or to make such changes an issue in this dispute, it is contended that this arbitrator is not authorized to adopt the Carriers proposal that the UTU-represented employees be placed under the Wabash schedule agreement; rather, they contend, this arbitrator is limited to imposing an Implementing Agreement that provides the basic protections and a "fair and equitable method for the selection of forces to perform the work involved."

The Organizations further argue that neither judicial decisions, ICC decisions, nor arbitration decisions support the Carriers' argument that the Interstate Commerce Act gives the ICC the authority to supersede collective bargaining agreements and change representation of railroad employees by its approval of a railroad acquisition. The Organizations further argue that even if the ICC had such authority as claimed by Carriers, it did not exercise such authority in this case.

With respect to the question of the method of consolidating the seniority rosters, the Organizations take different positions.

The BLE is opposed to dovetailing rosters on the basis proposed by Carriers contending that such method is inequitable and would do violence to the basic concept of seniority. The BLE urges that the seniority rosters for the craft of locomotive engineers on the combined Carrier be consolidated by dovetailing the rosters for locomotive engineers on the N & W and the IT on the basis of entry into the craft of fireman

and engine service without penalizing senior employees presently furloughed by the recession. The BLE opposes the effort by Carriers to consolidate the engineers' rosters by promotion dates after seperating the engineers into so-called active and inactive categories. The Carriers' proposal, BLE contends, creates runarounds of senior engineers by junior engineers, and penalizes senior employees on furlough and those persons who may be on sick leave or in an inactive status through no choice of their own; and is further inequitable because it does not take into consideration and employee's length of service with his orginal employer, thereby failing to consider his work contribution, disregards the different hiring and promotion patterns and practices on the two Carriers, and serves to benefit the employee working for an inefficient Carrier that has not already made economies in operation as compared with efforts to economize on the other Carrier. The BLE further oppose the UTU proposal (suggesting that the N & W and IT rosters be combined on the basis of a work equity principal) asserting that the UTU proposal "suffers from much of the same criticism of the Carriers' proposal" in that it "over-looks the foundational r mise of seniority integration to first look to the employees length of service with his original employer," and to the prior seniority rights of employees to service on their former seniority district or territory. Additionally, the BLE argues, that there is little if any data upon which to adequately consider and apply an equity formula in this case. The BLE suggests that any figures obtainable are "tainted" and cannot serve as the basis for integrating seniority rosters in a fair and equitable manner. The exclusive engine hour formula proposed by UTU could benefit the IT engineers and penalize N & W engineers because they were employees of a more efficient Carrier; and that an equity formula such as that proposed by UTU fails to take into account various factors including number of employees, hours worked, earnings, mileage, car count and tons carried. Since there is little uniformity of these factors between the two Carriers, the formula suggested by the UTU must be "disregarded as impracticable and inequitable, and other considerations must be used in combining the rosters."

The UTU takes the position that its "work equity" proposal is the most equitable because it recognizes the increase in

work and job opportunities for all employees contributed to the combined operation by IT employees. Since IT employees are comparatively junior, the straight dovetailing by seniority date method would result in the IT work being performed by N & W employees. The UTU further argues that placing all presently furloughed N & W and IT employees in a separate furlough roster would eliminate all future job opportunities for those employees even though some of them may be senior to employees on the active roster.

The UTU urges that the integration of rosters be made on the basis of the existing 1972 St. Louis Terminal Agreement; and that the difficulties in working out the terms of that Agreement as allegedly experienced by the N & W could be obviated by renegotiating the terms of that Agreement. Otherwise, the UTU argues, "to sanction implementation of such a [dovetailing] plan would not only violate the provisions of the Railway Labor Act and *NYD* but could in no sense be considered the 'fair and equitable arrangement to protect the interests of the railroad employees affected' ".

Findings and Conclusions

Issue No. 1

After careful examination of the relevant statutory provisions and their legislative history, judicial and arbitral decisions, and the ICC imposed Conditions, this Arbitrator is compelled to conclude that he has no authority to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

The ICC, in its decision of June 22, 1981, stated:

> "Our approval of NW's acquisition of IT must, nonetheless be conditioned on NW's agreement to provide 'a fair arrangement at least as protective of the interests of employees who are affected by the transaction' as the labor protective provisions imposed in control proceedings prior to February 5, 1976. 49USC § 11347. In *New York Dock RY.—Control-Brooklyn Eastern Dist.* 360 ICC 60

(1979) (*New York Dock Aff'd Sub. Nom. New York Dock RY.* v. *United States,* 609 F. 2D 83 (Second Cir. 1979), we described the minimum protection to be afforded employees under that statute in the absence of a voluntarily negotiated agreement. . . ."

Article I, Section 4 of the *New York Dock* conditions (Appendix III) provides in pertinent part:

> "Each railroad contemplating a transaction which is subject to these conditions and may *cause the dismissal or displacement of any employees, or rearrangement of forces,* shall give at least ninety (90) written notice of such intended transaction . . . such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.
>
> Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement *with respect to application of the terms and conditions of this Appendix,* and these negotiations shall commence immediately thereafter and continue for at least thrity (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, *shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this Section 4. . . .*" (Underscoring added)

Section 2 of Appendix III provides:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, priveleges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved *unless changed by future collective bargaining agreements or applicable statutes.*" (Underscoring added)

Title 49 USC § 11347 of the Revised Interstate Commerce Act (a recodification of Section 5 (2)(f) applicable at the time the *New York Dock* matter was pending before the ICC), provides:

> "When a rail carrier is involved in a transaction for which approval is sought under Section 11344 and 11345 or Section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this Section before February 5, 1976, and the terms established under Section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period)."

Prior to February 5, 1976, the Commission developed a series of standard employee protective conditions imposed by the ICC in approving a transaction involving one or more railroads under Section 5 (2) of the Interstate Commerce Act.[3] All of these job protection agreements were patterned after the Washington Job Protection Agreements of 1936 (WJPA.)

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[3] The principal sets of conditions imposed by the ICC under former Section 5(2)(f) in Stock Control cases were the "*New Orleans Conditions*" and the "*Southern—Central of Georgia Conditions.*"

Section 4 of the WJPA requires that employees be given 90 days' notice of a coordination, and that such notice "shall contain a full and adequate statement of the proposed changes to be effected by such conditions, including an estimate of the number of employees of each class affected by the intended changes." Section 5 of WJPA states:

> "Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on basis accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

The *New York Dock Conditions* are derived from the Washington Job Protection Agreement, the New Orleans Conditions, and Appendix C-1.[4] In formulating the *New York Dock* conditions, the ICC selected the most favorable of the provisions contained in these conditions. The *New York Dock* conditions included a provision not contained in the WJPA, and that was Section 2, quoted above.

Carriers argue that this Arbitrator has the authority *and the duty* to prescribe N & W's proposal, and that this Arbitrator's power is not constrained in his authority to prescribe the terms of any "rearrangement of forces." Since the Commissions authority is exclusive and plenary under the provisions of Section 11341 of the Interstate Commerce Act, the Arbitrator's authority is derived from, and is an extension of, such exclusive and plenary authority. Carriers argue that the Commission's order authorizing the purchase and consolidation of IT by N & W and requiring arbitration of disputes involving the

[4] Protective provisions promulgated by the Secretary of Labor under the Rail Passenger Service Act of 1970.

"rearrangement of forces" supersedes any other agreements or laws, including the Railway Labor Act.[5]

Central to the position of the Carriers is the question of whether the negotiation and arbitration provisions of employee protection conditions in consolidation cases provide a mechanism that supersedes Railway Labor Act requirements and permits an Arbitrator to transfer work and employees despite any such prohibitions contained in collective bargaining agreements pursuant to the Railway Labor Act.

This Arbitrator is of the opinion that the question must be answered in the negative.

An Arbitrator's authority under Article I, Section 4 of *New York Dock*, where the parties are unable to reach agreement, is limited to the determination of employee protections contained in Appendix III, and to provide a basis for the selection of work forces of the employees involved. Article I, Section 4 does not give an Arbitrator authority to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are "preserved" under Section 2. It follows that an Arbitrator is not empowered, without mutual agreement of the parties, to substitute, modify or terminate agreement negotiated pursuant to the provisions of the Railway Labor Act. Carrier's contention that the arbitration process (provided in Section 4) is an integral part of the collective bargaining process, and as such, an agreement may be changed (as provided in Section 2) either by negotiation by the parties or by an arbitration award is, in this Arbitrator's view, based on the erroneous premise that the ICC mandated involuntary "interest arbitration" in contravention of the provisions of the Railway Labor Act. No persuasive authority has been presented that supports or warrants such a far-reaching result.

Contrary to the contention of Carriers, the ICC in *Southern Railway Company-Control-Central of Georgia Railway* Company (Finance Docket No. 21400, 331 ICC 151) does not, in the opinion of this Arbitrator, support the position of Carriers.

[5] Sections 2 Seventh, and 6 of the Railway Labor Act prohibit a Carrier from unilaterally abolishing or revising a bargaining agreement.

A reading of the ICC decision in *Central of Georgia* warrants the finding that the ICC, notwithstanding its plenary and exclusive jurisdiction in these matters, recognizes the need to preserve the rights of employees under their collective bargaining agreements; and that those rights may not be abrogated by arbitral fiat

At page 169, the Commission states:

> "[T]he rights of railroad employees under their collective bargaining agreements, under the Washington Agreement and under the protective conditions imposed upon the Carriers under Section 5 (2)(f) are independent, seperate, and distinct rights. *We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers.* The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees."

The Commission goes on to state, at page 170:

> "Of equal importance, this contention of applicants is demonstrably erroneous. By its terms, Section 5 (11) applies only to antitrust and other restraints of law from carrying 'into effect the transaction so approved***'. Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed Section 5 transactions have been successfully consummated in full compliance with such terms.
>
> * * *
>
> *The designated 'exclusive and plenary power' of the Commission in Section 5 (11) cannot be so broadly construed as to brush aside all laws—be they statutorily created anti-trust laws or voluntary contractual agreements made binding by the force of law."* (Underscoring added)

In further support of this Arbitrator's holding that Carriers are in error when they contend that the ICC's exclusive and plenary authorization of the purchase and acquisition of IT by N & W supersedes any other agreements or the Railway Labor Act, and, by extension, that "an arbitrator has the authority, under the necessary, 'superseding' authority of Section 4 of *New York Dock*, to alter collective bargaining agreements in order to achieve an effective consolidation," Referee Bernstein in *American Railway Supervisors Association et al vs. Southern Railway System* (Docket No. 141) stated the following relative to the WJPA (from which *New York Dock* conditions are derived) and the Railway Labor Act:

> "Section 5(2)(f), enacted in 1940, directs the Interstate Commerce Commission to impose conditions for the protection of employees in merger and other cases. In intent and practice those conditions are much like those of the Washington Agreement. The labor organizations declared at the hearings on the measure that they sought to achieve similar employee protections on railroads which then did not subscribe to the Washington Agreement. Other provisions of the 1940 Act relieved the carriers of the threat of mandatory mergers hanging over their heads from earlier Transportation Acts. In the period preceding enactment in 1940 there was no recalcitrance by railroad labor organizations which arguably required any limitation upon their rules agreements and the job ownership they often were taken to imply; no one contended that the Washington Agreement was inadequate to its tasks. Nothing in the legislative history of Sections 5(2)(f) or 5(11) was presented which even remotely shows an intention by Congress, or anyone else, to abrogate the rules arrangements, including their merger-barring effect and the Washington Agreement's machinery for overcoming them. Indeed, as noted below, the legislation specifically recognizes the desirability and validity of such private arrangements.

Quite clearly Section 5 (11) operates to relieve carriers involved in a merger approved by the ICC of any requirement for State agency approval, the antitrust laws and other Federal, State or municipal law. Although the claim is made that this section reaches so far as to overcome provisions of the Railway Labor Act as applied to the Washington Agreement, the context and pattern of the section suggest otherwise. All of the references are to corporate, antitrust and State and local regulatory laws—there is no hint that labor-management relations are involved. Nothing in the legislative history was brought forward to suggest that a wholesale change in the procedures of the Railway Labor Act for modifying rules agreements—assuredly a fundamental and important change—was intended. Any such endeavor would have meant a major legislative battle on the point; but no such thing occurred. It staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time. Nor was such an effect necessary as to mergers because the Washington Agreement provided the mechanism to accomplish them.

* * *

The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreement, benefits to those adversely affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions; the Agreement also has limits upon the termination of is applicability. Hence when a merger etc. is undertaken before the required steps to end the Agreement are taken this Agreement binds the union to permit the job combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits. The recognition given the Washington

> Agreement in the last sentence of Section 5(2)(f) indicates that Congress regarded such a private contractural arrangement as harmonious with the ICC power to imposed employee protective conditions. That provision should be read with Section 5(11). The recognition and encouragement thereby accorded the Agreement argues that it is not overridden by Section 5(2)(f) nor is the protection accorded to the Agreement by Section 6 of the Railway Labor Act vitiated."

The Arbitrator has reviewed the awards cited and relied upon by Carriers and, with all due respect for their authors, disagrees with their conclusions.

None of the awards contains any rationale or analysis that would form any justifiable basis for the result reached. These awards are not only not instructive but cannot be considered to have any precedential value. See: *Conrail & Detroit Terminal Company & RYA* (August 13, 1981); *Chesapeake & Ohio Railway & BLE/UTU* (May 12, 1980); and *New York Dock Railway & Brooklyn Eastern District Terminal & BLE* (December 15, 1980.)

The Aribtrator has also reviewed the judicial decisions cited by Carriers, and has found them to be either irrelevant or unpersuasive as to the matters involved in this dispute. None of the cases cited deals directly with the nature and extent of an Arbitrator's authority to alter or invalidate negotiated bargaining agreements under the circumstances presented.

The Arbitrator is satisfied, considering all of the circumstances, that the "work equity" proposal of the UTU is not as equitable over-all as the method proposed by BLE and agreed to by the Carriers.

* * *

Based on the foregoing, the Arbitrator renders the following:

AWARD

1. The Arbitrator is not empowered, without specific authority and mutual agreement by the parties, to substitute, modify or abrogate a collective

bargaining agreement (or any provisions thereof.) There is, therefore, no jurisdiction to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

2. The parties are directed and ordered to consolidate the seniority rosters for the craft of locomotive engineers on the combined Carrier on the basis of date of entry into the craft of firemen and engine service without differentiating between active and furloughed employees; and the parties should execute any agreement necessary to carry out the direction and order of this paragraph of the Award.

NICHOLAS H. ZUMAS

Nicholas H. Zumas, Arbitrator

Date: February 1, 1982

APPENDIX B

In The Matter Of Arbitration Between:

NORFOLK AND WESTERN RAILWAY COMPANY

INTERSTATE RAILROAD COMPANY, and

SOUTHERN RAILWAY COMPANY

and

TRAINMEN AND CONDUCTORS
Represented by the United
Transportation Union

Arbitration Pursuant to Action By the National Mediation Board and Notice of the Interstate Commerce Commission in Finance Docket Number 30582 (Sub-No. 1)

Arbitration Panel:	Robert J. Ables, Neutral Referee, Washington, D. C. David N. Ray, Carrier Member, Director, Labor Relations, Southern Railway Company L. W. Swert, Employee Member, United Transportation Union, Vice President
Appearing For The Carriers:	Jeffrey S. Berlin, Esq., Washington, D. C. Russell E. Pommer, Esq., Washington, D. C. William P. Stallsmith, Jr., Esq., Norfolk, Virginia

Also Present or Testifying for The Carriers:	T. E. Gurley, General Manager, Eastern Region, N & W Robert S. Spenski, Assistant Vice President, Labor Relations, Southern E. M. Martin, Regional Director, Labor Relations, N & W J. R. Binau, Assistant Director, Labor Relations, Southern K. J. O'Brien, Assistant Director, Labor Relations, Southern M. C. Kirchner, Director, Labor Relations, Norfolk Southern
Appearing For The Union:	Clinton J. Miller, III, Esq., United Transportation Union, Assistant General Counsel, Cleveland, Ohio
Also Present or Testifying for The Union:	A. Smith, UTU General Chairman, Southern R. F. Spivey, UTU General Chairman
Proceedings:	Netural referee appointed by the National Mediation Board: June 13, 1985. Pre-hearing briefs received: August 26, 1985. Arbitration hearing: Atlanta, Georgia; August 28, 1985. Transcript received: September 3, 1985. Post-hearing briefs received: September 9, 1985.
Date of Decision:	September 25, 1985.

ARBITRATION AWARD

NORFOLK AND WESTERN RAILWAY COMPANY
INTERSTATE RAILROAD COMPANY
SOUTHERN RAILWAY COMPANY

and

TRAINMEN AND CONDUCTORS Represented By
The United Transportation Union

OPINION

I. JURISDICTION

This dispute between railroads and their employees is another round of an old fight fought on the same battlefield. Each side has had enough victories to encourage it to persist in the contest. Neither side seems to want to change either its strategy or tactics, and neutrals, like arbitrators and judges, have not seemed to be able to make a decision to put the issue to rest. The decision here is not likely to do more.

1. Issue

At issue is the right of railroad employees represented by their labor organization, the United Transportation Union (Union) in this case, to say to their employer railroad(s), the Norfolk and Western Railway Company (N & W), Interstate Railroad Company (Interstate) and Southern Railroad Company (Southern) (Carrier or Carriers), after consolidation authorized by the Interstate Commerce Commission (ICC or Commission), with labor protective conditions that, if pay, rules, working conditions, etc., in an existing collective bargaining agreement would be changed as a result of changes made by the Carrier authorized by the consolidation, such pay, rules, working conditions, etc., can be changed only by further collective bargaining under the provisions of the Railway Labor Act (RLA), and not under the arbitration provisions of the

labor protective conditions specified by the ICC in the event the parties are not able to make an agreement to implement the consolidation.

There is respectable judicial and arbitral authority to support the Union's position that the RLA controls.

There is respectable judicial and arbitral authority to support the Carriers' position that the arbitration provisions control.

2. ICC Conditions

The dispute on this point seems to flow not from any challenge of the right of the ICC to specify labor protective conditions upon authorizing a railroad consolidation (or exempting it from regulation), but from the kind of such conditions specified.

Despite a record of proceedings approaching those in hotly contested cases appealed to a U. S. Court of Appeals,[1] it is not clear why the ICC persists in specifying labor protective conditions that perpetuate the problem.

a. Section 2 Conditions

On the one hand, the Commission regularly specifies the following condition in labor protective conditions:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

[1] Including pre-hearing briefs, transcript, post-hearing briefs, countless references to court and arbitrators' decisions and many other exhibits.

Typically, the ICC specifies this condition in Article 1, Section 2 (Section 2) of its protective conditions, like the *Mendocino Coast* conditions applicable here.[2]

The clear implication of this condition is that the essence of an existing collective bargaining agreement (pay, rules, working conditions, pension rights, etc.), if not the agreement itself, continues after consolidation ("shall be preserved") unless changed by "future collective bargaining agreements". This latter phrase has two important implications: any new agreement must be different from the existing agreement and it has to be bargained for—which by definition means agreement or resort to authorized statutory actions to break the deadlock.

Thus, Section 2 applicable here in the Mendocino conditions provides substantial leverage for the Union arguing that certain changes desired by the Carriers under its ICC authorization (exemption) cannot be made unless both parties agree to the changes.[3]

[2] Labor (or employee) protective conditions now authorized in the Interstate Commerce Act, resulting from railroad merger, consolidation, acquisition (including trackage rights), etc. ("consolidations"), date back, at least, to The Washington Job Protection Agreement of 1936. In the present dispute, the ICC adopted the "Mendocino" conditions (*Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 354 ICC 732 (1978), *modified*, 360 ICC 653, (1980), aff'd, *sub nom. Railway Executives' Ass'n. v. United States*, 675 F.2nd 1248 (D. C. Cir. 1982), and *Norfolk and Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 ICC 605 (1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 ICC 653 (1980), aff'd. *sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2nd 1248 (D. C. Cir. (1982)). "New York Dock" conditions are also specified by the ICC for similar authorized changes. They are virtually the same as the Mendocino conditions. There have been—and there presently are—a number of differently named conditions all having the same purpose of specifying protection of railroad employees adversely affected by consolidations. The kind or adequacy of labor protective conditions in the present dispute are not in issue.

[3] The parties have agreed on all provisions except one. The 27 trainmen on the Interstate Railroad who are being consolidated into the N & W and Southern coal rail operations at coal sources in Southwest Virginia object to working under the N & W schedule of agreements (collective bargaining agreement or contract) and prefer to continue working under their own contract. In the alternative, the Interstate employees are willing to work

(footnote continues)

b. Section 4 Conditions

As the Union draws comfort in this dispute from Section 2, the Carriers emphasize that Article 1, Section 4 (Section 4), of the Mendocino conditions controls.

This section provides in pertinent part that where the Carriers contemplate an authorized transaction which

> will result in a dismissal or displacement of employees or rearrangement of forces

negotiations for the purpose of reaching an implementing agreement are required. If, at the end of a 20-day period the parties fail to agree, negotiations are to terminate and either party to the dispute may submit the dispute for adjustment, in accordance with designated procedures, including designation of a neutral referee whose decision "shall be final, binding, and conclusive".[4]

The clear implication of this Section 4 condition is that a "transaction", such as here contemplated, of at least rearranging forces,[5] was envisaged by the ICC when it granted the

(footnote continued)

under the Southern contract. According to the Interstate employees, working under the N & W contract would—or probably would—require a change in home base with associated problems of moving families from Andover, Virginia to Norton, Virginia, about a 45-minute drive in these mountainous, narrow, coal traffic roads. That this is a relatively small railroad has no bearing on the intensity with which each party has argued its case. The issue being the same as in much larger consolidations, each side has brought out its heavy legal artillary to argue the case.

[4] The Carriers, here, invoked this authority by petition to the National Mediation Board. The Union opposed the petition. Such Board appointed this arbitrator to help resolve the dispute. At the arbitration hearing, the Union agreed with the Carriers to proceeds on the basis of a Tri-Partite Arbitration Panel but held to its position that this panel had no authority to decide the question of applicability of contract.

[5] The Carriers contemplate consolidating Interstate employees into the N & W Pocahontas Division. Although Interstate employees will have certain priority rights to work they performed before the consolidation and certain "equity" when the work is performed by N & W employees, seniority rosters will be integrated and assignments can vary off the property before the consolidation.

Carriers the authority (exemption) to consolidate and it anticipated inability of the parties to negotiate an agreement to implement such transaction or changes from past operations[6] by prescribing an arbitration procedure to resolve the dispute.

Under the logic of this condition, it is almost inconceivable the Commission would not have known that pay, *rules*, working conditions, etc., under an existing contract, would not be affected by the transaction. Thus, the Commission intended to give priority to its statutory base for authorizing the consolidation with protective conditions, namely, the Interstate Commerce Act, over anything in conflict under the Railway Labor Act.

c. Section 2 and Section 4 Impasse Not Resolved by ICC

Such long-time apparent, sharp inconsistency existing in its labor protective condition between Section 2 and Section 4, it would seem the Commission would have cleared up the matter one way or the other. It has not.

Whether the Commission is skittish about taking a firm position on a question which involves administration of a statute (RLA), over which it has no responsibility, may only be speculated. It may even be that the Commission has been inattentive to the discrepancy.[7]

[6] Considering, among other things, that the purpose of the request to consolidate was to take advantage of the best grades of the respective railroads and to otherwise make the operation less costly and more efficient.

[7] A summary of the development of labor protective conditions by arbitrator Zumas—drawing on analyses by other arbitrators—is a basis for this speculation. In *The Matter of Arbitration Between Norfolk and Western Railway Company and Illinois Terminal Railroad Company v. Brotherhood of Locomotive Engineers and United Transportation Union*, decided February 1, 1982. Also, see, decision by arbitrator Seidenberg in *The Matter of Arbitration Between Baltimore and Ohio R.R. Company, Newburgh and South Shore R.W.Y. Coal and Brotherhood of Maintenance of Way Employees and United Steel Workers of America*, decided August 31, 1983.

In the Seidenberg award, the arbitrator reports that Section 2 of the New York Dock Conditions was newly added to the varied set of such conditions

(footnote continues)

The Commission may even have decided to defer to the courts the question of the applicability of the RLA, upon consolidation, in view of the substantial litigation and conflicting decisions on this and related points.

Whatever the reason the Commission has not reconciled Sections 2 and 4, the question has come around again in this proceeding: Does this arbitration panel have jurisdiction to consider the content of an implementing agreement where an existing contract would be changed and, if so, what shall be the contents of that implementing agreement?

3. Arguments

The Carriers are the moving party. They argue that:

(a) It would be inappropriate for the arbitration panel to decide the jurisdictional question because Section 4 provides required authority to fashion an implementing agreement without need to regard the "extrinsic" question on jurisdiction, leaving the disappointed party to take appropriate appeal to court.

(b) In the event the arbitration panel considers the jurisdiction question posed by the UTU, the Union's argument is defective because a tentative implementing agreement was reached by the parties on April 17, 1985, in bargaining under applicable Mendocino conditions, not under the RLA, which is not required. Also, the Carriers argue that a recent decision by the Court of Appeals for the District of Columbia Circuit, on which the Union heavily relies, actually supports the Carriers' position because, implicit in the remand of the case of the ICC to make certain findings of "necessity", was the conclusion that the Commission had the authority to decide as it had, but that

(footnote continued)

developed by the Commission since the Washington Job Protection Agreement of 1936. The New York Dock Conditions were prescribed by the Secretary of Labor (not the ICC) for those agreements whereby carriers discontinue their inter-city rail passenger service which was assumed by AMTRAK. The dissimilarity is apparent between such change in railroad operations and the instant case involving like operations in the same area and affecting only 27 employees.

it had not satisfied certain preconditions. The Carriers urge reliance on an earlier decision in the Eighth Circuit Court of Appeals which is said to be more on point on the jurisdiction question.

(c) The Carriers were not precluded from going forward with preferred changes under Section 4 of Mendocino because of the Commission's finding on April 3, 1985 in the underlying case in this proceeding that "[n]o evidence has been presented to demonstrate that involved railroads intend to abrogate the contractual or statutory rights of employees". According to the Carriers, all this finding suggests is that allegations of a conflict between employees' RLA rights and a carriers' plans to effectuate an ICC authorized transaction are not to be resolved in an administrative proceeding in which the ICC passes upon the applicability or inapplicability of a blanket Section 10505 exemption.

The Union argues that:

(a) Section 2 of Mendocino precludes this arbitration panel deciding that Interstate railroad employees must operate under the N & W contract, relying in this conclusion on a series of supporting awards by arbitrators and that contrary awards by arbitrators have been eviscerated by the recent decision of the Court of Appeals for the District of Columbia Circuit.

(b) In any event, the ICC notice of April 3, 1985, concerning the absence of Carrier information on intention to abrogate contractual or statutory rights of employees shows that the Commission did not intend that there be an exemption from the requirements of the Railway Labor Act with respect to changes of pay, rules and working conditions.

4. Arbitration and Court Decisions

Arbitrators' decisions have not been dispositive of the Section 2, Section 4 impasse.[8]

[8] The parties cited a number of arbitration awards on point. The majority of awards cited favor the Union's position—but not overwhelmingly. The arbitration decisions reported are typical of the findings.

Decisions by experienced and respectable arbitrators Zumas and Seidenberg, *supra,* do not settle the matter. Each arbitrator decided against jurisdiction based on Section 2 but proceeded to require changes such as merging seniority rosters as part of an implementing agreement. Seniority rights being arguably the most important contract right for an employee, it is difficult to see a basis for deciding a Section 4 question in view of the arbitrator's decision on Section 2.

A more recent decision by arbitrator (judge) Brown on which the Carriers rely also cannot be accepted as new reasoning on the Section 2, Section 4 controversy. That arbitrator accepted jurisdiction on the strength of Section 4, adopting the argument that the ICC had plenary and exclusive authority in the field. *In The Matter of Arbitration Between Union Pacific Railroad Company and United Transportation Union,* decided January 1985. The difficulty with that decision is that, subsequently, the Court of Appeals for the District of Columbia Circuit, with respect to the same underlying consolidation, decided, in a split panel, that the Commission had completely failed to justify the necessity for waiving the Railway Labor Act respecting crew selection, following certain trackage rights granted to other railroads affected by such consolidation, and the court remanded the dispute to the Commission to consider whether it was necessary to waive the RLA to effectuate the transactions at issue in that consolidation. *Brotherhood of Locomotive Engineers v. ICC,* 761 F.2d 714 (D.C. Cir. 1985), *modified*—F.2d—(July 12, 1985), referred to hereinafter as "BLE".[9]

[9] The Carriers here urge adopting the decision of the Court of Appeals in the case of *Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Company,* 314 F.2d 424 (8th Cir.) *Cert. denied* 375 US 819 (1963). In that case, the action was by the railroad against the union for a judgment declaring rights of the parties with respect to procedures to be followed in adjusting seniority rights of employees affected by consolidation of railroad yards. The Court of Appeals affirmed the District Court (202 F.Supp.277) that statutory authority conferred upon the Interstate Commerce Commission to approve and facilitate merger of carriers includes power to authorize changes in working conditions necessary to effectuate such mergers and the Commission acted within its jurisdiction in providing for adjustment

(footnote continues)

As modified, the Court vacated the Commission's 1983 orders and remanded the case to the Commission. Supporting such decision, the Court said:

> The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

5. Arbitration Panel Has Jurisdiction To Order Implementing Agreement

Whatever arguments remain on the merits of the split decision in the BLE case, it can no longer be argued sensibly that, simply because the ICC has authority to impose protective conditions in railroad consolidations, RLA rights may be disregarded. But that is not to argue that the BLE decision puts the RLA back in the stream of things in consolidations of the kind in issue. The majority of the BLE court—with a vary strong dissent—remanded the case *to the ICC* to make findings it had not previously made with respect to RLA rights. The majority decision, therefore—as well as the minority decision—may be taken for the conclusion that the ICC can take all necessary action to authorize a consolidation, including labor

(footnote continued)

of labor disputes arising out of the approved merger. The Court of Appeals noted that, under the Railway Labor Act in a major dispute, employees cannot be compelled to accept or arbitrate as to new working rules or conditions, 45 U.S.C.A. § 151 *et seq.*, but that, as a result of the authorized merger in that case, the railroads and unions were relieved from requirements of the RLA by the Commission's authority under the Interstate Commerce Act concerning merger of carriers. Interstate Commerce Act § 5(2)(b), (c)(4).

protective conditions and procedures to resolve disputes on implementing agreements, including arbitration without deference to RLA collective bargaining rights. The only imperative is that the ICC make required findings, not that it is not authorized to make them.

As it can be accepted that the ICC has authority, i.e., jurisdiction, to effectively make a package deal on consolidations, labor protective conditions and procedures to resolve disputes on implementing agreements—based on both the Eighth Circuit and D. C. Circuit opinions—there is no logical reason not to accept that an arbitration panel, authorized under the ICC consolidation action, would not have jurisdiction to order changes to meet the purposes and objectives of the consolidation.

On such reasoning, this panel has jurisdiction to take Section 4 action in this case.

Such conclusion does not close the door in favor of the Carriers.

The Union argues, with some persuasion, that, by not presenting their RLA arguments to the Commission, the Carriers did not argue their case at the time and place to have accomplished their objectives.

It is most troublesome that, at the time the Railway Labor Executives' Association (RLEA), on behalf of employees in this dispute, argued RLA rights to the ICC, the Commission not only commented that "[n]o evidence has been presented to demonstrate that the involved railroads intend to abrogate the contractual or statutory rights of employee" (ICC Notice, Finance Docket No. 30582 (Sub No. 1), April 3, 1985), but added in the same notice that, although exemptions under 49 U.S.C. 10505, do not operate to relieve carriers of applicable laws and agreements relative to labor relations

> This proceeding is not the appropriate forum to resolve the issue of whether applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes under either the exempted contract to operate or the trackage rights.

If the Commission meant that the appropriate forum was an arbitration panel, as here, the Commission was ducking its clear responsibility to complete the package to satisfy its statutory responsibilities.

If the Commission meant that the appropriate forum was the courts, it was ducking the same responsibilities.

If the Commission meant to leave the parties to their RLA rights, it was ducking the same responsibilities.

Actually, it seems that the Commission was just ducking.

There is no need or reason for this arbitration panel to duck.

The ICC had jurisdiction to complete the action; thus, the panel has jurisdiction to complete the action.

An implementing agreement will be ordered.

II. IMPLEMENTING AGREEMENT

No responsible court would ultimately refuse to order an implementing agreement under the disputes settling provisions of Section 4. Only the 27 trainmen off the Interstate Railroad who did not ratify the tentative agreement of April 17, 1985, are holding out on working under the N & W contract. All the other unions in this case have accepted the same or similar agreement, including organizations representing firemen, engineers, clerks and maintenance of way employees.

Labor protective conditions are in place.

There is no legal, public policy, or common sense reason not to decide at this level of proceedings what will eventually be decided, i.e., an implementing agreement to accomplish the purposes of an authorized consolidation.

The proposed joint operation of the Interstate Railroad properties, which are located in the coal fields of Southwestern Virginia, following a consolidation in 1982 of N & W, Southern and their respective subsidiaries, including Interstate, under the control of Norfolk Southern Corporation, is intended to take

advantage of better grades and operating routes for traffic moving from Interstate origins to points on the N & W and Southern and to achieve certain economies and efficiencies in interstate operations.

Among changes proposed by the Carriers to realize the advantages of such joint operation are consolidating the seniority rosters of Interstate train and engine service employees with those of N & W Pocahontas Division train and engine service employees. At present, Interstate crews do not work on N & W lines or vice versa. Upon consolidation, Interstate crews will operate off the Interstate territory. They would work shifters in the area that can work both Interstate and N & W mines.

According to T. E. Gurley, General Manager, Eastern Region, N & W Railroad, who testified at the arbitration hearing, in future operations, it is not contemplated that Interstate crews will be operated separately from the crews of the N & W. Rather, it is contemplated that the crews will be combined on shifters in the Norton and Andover, Virginia area, based on their seniority on both N & W and Interstate. If the Interstate trainmen did not operate under the N & W contract but, rather, operated under their present Interstate contract, important contract problems would develop, including observance of the Hours of Service law; different reporting locations for crews operating the same territory; differences of total hours worked each week (referred to as "gouging"); differences on opportunities to bid for and displace a junior employee on a job preferred by a senior employee; and different operation of extra boards. If, however, the N & W contract were applicable (for the 27 Interstate trainmen and the existing 816 N & W trainmen), employees, including present Interstate employees, would be able to draw assignments throughout the territory (which is considerably larger than the territory presently operated by Interstate contracts, such as deadheading, filling vacancies, meal times, selection of vacation times and arbitraries, which would creat friction as between N & W and Interstate crews working the same territory if the employees worked under different contracts, would be eliminated. Also, Interstate employees would enjoy the higher basic rate of pay presently applicable in the N & W contract.

According to A. Smith, General Chairman for the trainmen and conductors on both the Interstate and Southern railroads, the Union offered to work under the Southern agreement, which would accomplish exactly what the Carriers intend under the proposed implementing agreement, including the N & W contract. According to this official, there would not be, for instance, a provision for gouging or a provision that a senior brakeman could displace a junior brakeman. There would be a deadhead rule and extra boards would not be different. And there would be no difference in meal allowances or in bidding for vacant positions. Moreover, the Interstate employees would get a raise under either the Southern or N & W agreement.

Further, to the question asked by counsel for the Union: "With the Southern Agreement being applicable, could the employees of the Interstate be required to report to Norton?" The answer was "Yes, sir." (Transcript, page 100).

On close questioning why the trainmen on the Interstate resisted accepting the tentative implementing agreement reached by the parties on April 17, 1985, the Union representative testified that the Interstate employees had worked previously with the Southern agreement and were more comfortable with it, but that their major concern was the possibility of having to move from their home area in Andover, Virginia to another point on the consolidated operation, with all of the adverse implications for families involved in such move.

In negotiations leading to the tentative implementing agreement, upon the insistence of Union negotiators, a seniority provision was agreed to in order to keep a fair balance between bidding rights of the relatively small number of trainmen off the Interstate as compared to those rights of about 816 trainmen off the N & W.

If, as the Union now accepts, Interstate trainmen might be required to move their home base under the Southern contract (which is acceptable to the union), and there is no substantial reason not to accept the N & W contract on the other differences between the two contracts, there is no reasonable basis to reject the tentative implementing agreement of April 17, 1985. Recognizing, again, that labor protective conditions

are in place and that, on its face, provisions in the N & W contract may actually be favorable to the Interstate employees, the tentative implementing agreement of April 17, 1985 is fair, equitable and reasonable and will effectuate the purposes and objectives of the transaction exempted by the Interstate Commerce Commission when it authorized the consolidation underlying the proposed joint operation of Interstate properties.

AWARD

1. This arbitration panel has jurisdiction to consider an implementing agreement under Article I, Section 4 of the *Mendocino Coast* labor protective conditions.

2. The Carriers are authorized to put into effect the tentative implementing agreement of the parties, dated April 17, 1985.

ROBERT J. ABLES

Robert J. Ables
Neutral Referee

Dated: September 25, 1985

DAVID N. RAY

David N. Ray
Carrier Member

Dated: September 27, 1985

L. W. SWERT
Dissenting Opinion Attached

L. W. Swert
Employee Member

Dated: October 10, 1985

Dissent of Employee Member to Award in Finance Docket 30582 (Sub. No. 1)

I cannot agree with the Award in this matter not only because it is contrary to the great weight of arbitral precedent and legal authority in my view, but also because of its cavalier treatment of the facts.

It assumes the April 17, 1985 document was a "tentative implementing agreement" throughout its analysis when the

record shows the matter of contract applicability was never settled. The Union parties merely agreed to submit the document to the membership as the carriers' last offer. Although the Award notes in footnote at page 5 that the parties agreed to all provisions of an implementing agreement "except one" (contract applicability), it treats the April 17, 1985 document *in toto* as an agreement in the remainder of its analysis.

More importantly, the Award purports to resolve collective bargaining issues that the carrier witness frankly admitted were not raised between the parties concerning the differences in the contracts at issue. Nothing could more clearly indicate this Board's usurpation of authority delegated by the Congress to the parties under the Railway Labor Act.

Finally, the Award's language itself indicates the the Board has acted far beyond the scope of its jurisdiction. The Board notes at page 7 that the ICC has not resolved over the years what the Board perceives as the inconsistency between Article I, Section 2 and Article I Section 4. Moreover, it is beyond cavil that unless the ICC justifies in its order that the Railway Labor Act be negated in a specific transaction, the requirements of that act regarding changes in contracts stand. This was noted by the Board in its citation to *BLE* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985) at pages 12 and 13. The Board then blithely ignored the ICC's specific order concerning Railway Labor Act rights cited at page 15, and after finding the ICC "ducked" the issue, decided it nonetheless had authority to change the contract on the property. This Board has no more authority than the ICC; and where the ICC has "ducked" this issue specifically, this Board may not resurrect it without acting outside the scope of its jurisdiction. *BLE* v. *ICC, supra.*

L. W. Swert

L. W. Swert, Vice President
United Transportation Union
Employee Member